UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RESTAURANT LAW CENTER, TEXAS RESTAURANT ASSOCIATION	)	Docket No. A 21-CA-1106 RP
vs.	)	Austin, Texas
UNITED STATES DEPARTMENT OF LABOR; MARTIN J. WALSH, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, IN HIS OFFICIAL CAPACITY; AND JESSICA LOOMAN, ACTING ADMINISTRATOR OF THE DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, IN HER OFFICIAL CAPACITY	)	February 9, 2022

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROBERT L. PITMAN

APPEARANCES:

For the Plaintiff: Mr. Paul DeCamp
Epstein, Becker & Green, P.C.
1227 25th Street, N.W., Suite 700
Washington, D.C. 20037

For the Defendant: Mr. Johnny H. Walker, III
U.S. Department of Justice
Civil Division,
Federal Programs Branch
1100 L Street N.W.
Washington, D.C. 20005

Court Reporter: Ms. Lily Iva Reznik, CRR, RMR
501 West 5th Street, Suite 4153
Austin, Texas 78701
(512)391-8792

Proceedings reported by computerized stenography, transcript produced by computer-aided transcription.

I N D E X

08:58:47 THE CLERK: Court calls: A 21-CV-1106, Restaurant Law Center and Others vs. United States Department of Labor and Others, for preliminary injunction hearing.

08:58:58 THE COURT: For plaintiff.

08:59:03 MR. DECAMP: Good morning, your Honor.

08:59:03 Paul DeCamp for the plaintiffs.

08:59:07 THE COURT: Mr. DeCamp.

08:59:07 MR. WALKER: Good morning, your Honor.

08:59:07 Johnny Walker representing the government.

08:59:09 THE COURT: Well, thank you all very much. We're here for the hearing on the plaintiffs' motion for preliminary injunction. Part of our protocols is, I've asked you to remain masked unless you're speaking, and then, you're welcome to remove your mask. And if would make your arguments from counsel table, rather than from the podium, just to maximize our distancing.

08:59:31 So let me first ask whether or not there's anything that needs to be put into the record that is not already in the record for purposes of this hearing? Mr. Decamp, anything from your side?

08:59:40 MR. DECAMP: Your Honor, we did submit -- and, actually, would your Honor prefer that I stand or remain --

08:59:44 THE COURT: You can -- you're fine remaining

08:59:47 seated. Just make sure the microphone is where it is.
08:59:50 That's great.
08:59:51 MR. DECAMP: Yes, your Honor.
08:59:52 We did submit as part of our exhibit list a
08:59:55 supplemental declaration of a witness. We've provided
08:59:58 that to the clerk last night. We would ask that that be
09:00:01 made a part of the record.
09:00:02 THE COURT: Okay. Any objection to that
09:00:04 supplemental?
09:00:04 MR. WALKER: I do have an objection, your Honor.
09:00:07 Part of it as to timing. Our understanding from
09:00:09 plaintiffs' motion for preliminary injunction is, they had
09:00:11 requested an oral argument with the Court. It was not --
09:00:14 I was not aware that they intended to conduct an
09:00:16 evidentiary proceeding until about 5:30 last night, when
09:00:19 they submitted for the first time to me an exhibit list
09:00:24 and a witness list.
09:00:25 That supplemental declaration is included on the
09:00:28 witness list. I have not seen it. It was not filed with
09:00:31 their preliminary injunction motion nor with their reply.
09:00:34 A copy has not yet been provided to me. So I object to it
09:00:36 on that basis.
09:00:37 THE COURT: Okay. What's the nature of the
09:00:39 exhibit?
09:00:40 MR. DECAMP: It's a -- it updates the declaration

09:00:44 of a witness, Tracy Vaught, who is a restaurant operator
09:00:47 in Texas, who submitted a declaration with the preliminary
09:00:50 injunction papers. We wanted to update the Court as to
09:00:54 what has happened since late December. And so, we got a
09:00:59 declaration from her just two days ago that updates as to
09:01:03 what has happened in her restaurants with regard to
09:01:05 compliance with the regulation and the burdens imposed by
09:01:08 it.
09:01:08 THE COURT: Okay. I'm going to find that that is
09:01:11 not a timely submission. This hearing has been set. It's
09:01:15 kind of, I think, not fair to the defendant to, the night
09:01:20 before, sort of reopen the evidence. And so, I'll sustain
09:01:27 the objection and that exhibit will not be a part of the
09:01:30 record.
09:01:32 All right. Has there been any conversation
09:01:35 between the two of you about how you want to proceed today
09:01:37 in terms of who's going to speak and how long and
09:01:40 everything? I'm yours. So.
09:01:43 MR. DECAMP: No, your Honor.
09:01:44 THE COURT: Okay. Well, if you'd like to
09:01:46 proceed, I'd be happy to hear from you.
09:01:48 MR. DECAMP: Thank you, your Honor. I'll remove
09:01:51 the mask now.
09:01:52 THE COURT: Great.
09:01:53 MR. DECAMP: So I think it's important to remind

09:02:08 the Court of what we're really talking about here today.
09:02:12 We understand the Court's familiar with papers. We won't
09:02:14 go over all the background. But importantly, we're
09:02:16 talking about language in the Fair Labor Standards Act.
09:02:21 Specifically, Section 6 of the Fair Labor Standards Act
09:02:24 requires that employers pay employees at least the federal
09:02:28 minimum wage. Section 3(m) of the Fair Labor Standards
09:02:33 Act -- and we have that text on the screen here that's
09:02:35 Plaintiffs' Exhibit 1 for purposes of the hearing. 3(m)
09:02:37 defines what counts as a wage for purposes of figuring out
09:02:40 whether an employer has satisfied the minimum wage. We've
09:02:43 highlighted the pertinent language here.
09:02:45 Specifically, Section 3(m)(2)(A) -- that's the
09:02:45 second highlighted block there toward the bottom of the
09:02:52 right column -- says that in determining the wage an
09:02:54 employer is required to pay a tipped employee, then it
09:02:59 goes on to say how we determine whether the tipped
09:03:01 employee's wages constitute wages and how the tip credit
09:03:06 works. We then go to the next page of this exhibit, which
09:03:11 follows through with that language. Section 3(t) of the
09:03:16 Fair Labor Standards Act, also the highlighted language
09:03:19 here on the second column, says that tipped employee, in
09:03:22 quotes, means any employee engaged in an occupation in
09:03:26 which he customarily and regularly receives more than $30
09:03:30 a month in tips.

09:03:32 The whole basis for the Department of Labor's
09:03:35 regulation in this area, beginning in the late 1960s and
09:03:39 following through to the final rule that's at issue in
09:03:42 this litigation, is the position that the words in the
09:03:46 Section 3(t), occupation and engaged in an occupation, are
09:03:51 ambiguous and that that, therefore, confers upon the
09:03:57 Department of Labor authority to regulate in this space.
09:04:01 First and foremost, the problem with that is the
09:04:03 department did not, in any respect, define either of those
09:04:06 terms. The regulation doesn't solve the ambiguity that
09:04:10 the department contends serves as the basis for its
09:04:12 authority to regulate.
09:04:14 Nowhere in the final rule does the department
09:04:16 attempt to define occupation nor does the department
09:04:20 attempt to define what it means to be engaged in an
09:04:23 occupation. The department purports to solve a different
09:04:28 problem. The department purports to define occupations in
09:04:32 terms of tipped occupations.
09:04:35 And the fundamental problem here, the fundamental
09:04:38 challenge, the disconnect between the final rule and the
09:04:41 statutory language is that the department doesn't attempt
09:04:44 to define those terms but, instead, defines the whole
09:04:48 world of employment of tipped employees into two buckets.
09:04:52 There is, quote, time spent in a, quote, tipped
09:04:55 occupation, close quote, and then, everything else.

09:04:58 That's the world that the department sees for its
09:05:02 regulation in this space. It makes the whole focal point
09:05:06 and the center of the analysis the tips as opposed to the
09:05:10 occupation. And therefore, we see the department in the
09:05:12 final rule accepting, for example, language from the
09:05:17 Eleventh Circuit's Rafferty's decision saying that,
09:05:19 really, tipped employees should be constantly,
09:05:22 consistently earning tips, that that ought to be the main
09:05:24 focus of the job.
09:05:27 And yet, the language in the FLSA belies that
09:05:29 because by authorizing the use of a tip credit, if an
09:05:34 employee receives just $30 a month in tips, that's not a
09:05:39 lot of money in tips. It's a gating function in the
09:05:41 statute. But an employee can earn $30 a month in tips or
09:05:44 what amounts to on average $7.50 in tips per week, with
09:05:50 next to no activity that actually produces tips. That
09:05:54 would be, for example, five instances of a server
09:05:56 receiving a 15 percent tip on a $10 bill for a customer.
09:06:01 That can happen in less than an hour.
09:06:04 So the idea and the premise of the department's
09:06:07 regulation that employees ought to be overwhelmingly
09:06:11 spending their time on tip-producing activities in order
09:06:14 to qualify for this tip credit is flatly inconsistent with
09:06:19 the low level of tips required as the threshold for being
09:06:22 a tipped employee under the FLSA. They're solving a

different problem.

The policy choice that the department embeds in the regulation and what drives the regulation is attempting to maximize tipped employee earnings, which may be a laudable goal, but that's not what the FLSA does. That's not what Section 3(m) does. It's not what Section 3(t) does. And it's certainly not what Section 6 does. The department is attempting through this final rule to afford tipped employees rights under the minimum wage law, purportedly under the minimum wage law that exceed the minimum wage rights that any other employee in the economy has, minimum wage plus. That's not what Section 6 is about. It's not what the tip credit is about.

So that's the fundamental disconnect. The department by not engaging in any effort to determine what does it mean to be in the occupation of a server, what does it mean to be in the occupation of a bartender, what are these occupations historically, what tasks belong in these occupations, and instead, going down an entirely different analytic path of dividing the world into time spent on activities that generate tips, time spent on activities that directly support activities that generate tips, and time spent on activities that do not either generate tips or directly support those activities.

That tri-part-type bucket, divorced from any

09:07:43 specific occupation, causes this regulation to fail at
09:07:48 Chevron step zero, Chevron step one, and Chevron step two.
09:07:52 The regulation, in other words, does not flow from the
09:07:56 statute. So whether or not the department would have some
09:07:58 theoretical authority to regulate, to define what it means
09:08:01 to be in an occupation, engaged in an occupation, what an
09:08:05 occupation itself means, they did not do that in this
09:08:08 final rule. They issued a different rule that does
09:08:12 something very different.
09:08:13 And so, because of that, what we see in the final
09:08:16 rule is a disconnect from congressional intent. We know
09:08:21 from the legislative history that Congress, enacting the
09:08:24 tip credit in 1966 and amending it in 1974, was intending,
09:08:29 by and large, with some modifications to preserve prior
09:08:32 practice. They weren't trying to change. Congress was
09:08:35 not trying to change which roles are tipped; they were not
09:08:38 trying to change the mix of duties in those roles.
09:08:41 Congress was in 1966 attempting to require at least a
09:08:44 minimum cash wage that did not apply before. That was put
09:08:48 in place along with the tip credit.
09:08:50 But Congress also was very clear that they
09:08:52 reviewed certain positions, like servers, like bussers,
09:08:56 like service bartenders, as tipped roles. But now we come
09:09:01 to what the department has done here. It's important to
09:09:07 recognize that the department's regulation is not only

09:09:10 disconnected from the notion of what Congress intended
09:09:13 here. It also is internally inconsistent. It treats
09:09:16 bussers and service bartenders, for example, very
09:09:19 differently from any other tipped employees. Whereas the
09:09:22 department sets forth this three-part test that we talked
09:09:24 about that I mentioned before of activity that directly
09:09:27 generates tips, activity that supports tip activity, and
09:09:32 then, activity that is other than those two categories,
09:09:35 the department here in the final rule -- and this is at 86
09:09:38 Federal Register, page 60128 and 60129 -- says that when
09:09:44 we're talking about bussers, we're going to apply a
09:09:47 different standard.
09:09:48 So, for example, bussers clearing tables after a
09:09:51 customer has left, so this is not customer facing, that
09:09:55 counts as tipped employee -- tip-generating activity.
09:09:58 That's that first category. And yet, for every other
09:10:01 tipped employee, the department would say unless it's
09:10:04 customer facing and customer service, then that doesn't
09:10:07 count. That would be in the second category of directly
09:10:10 supporting.
09:10:10 Same with service bartenders. Service bartenders
09:10:13 are individuals -- are also called bar-backs who are
09:10:16 preparing drinks outside of the customer's immediate
09:10:19 presence so that another person, like the bartender or a
09:10:22 server, can bring the drink to the customer. The

09:10:24 department says that service bartenders preparing a drink
09:10:28 that somebody else is going to present to the customer,
09:10:30 that's tip-producing activity, even though it's not
09:10:33 customer facing.
09:10:35 Logically, that activity is no different from
09:10:38 what a cook is doing in the kitchen, preparing food that
09:10:41 somebody else is going to bring to the customer.
09:10:43 THE COURT: But aren't those the sorts of calls
09:10:45 that administrative agencies make all the time?
09:10:48 Somebody's gotta draw these lines, and isn't that a
09:10:50 rational way to have drawn a line?
09:10:53 MR. DECAMP: Agencies do make these calls all the
09:10:55 time, and they are frequently irrational as this one is.
09:10:57 This is not the type of call that a department is free to
09:11:02 make when its own application of its rules is
09:11:07 inconsistent. It sets up a three-part test and then,
09:11:09 immediately says, but we're not going to apply it to two
09:11:11 of the six categories that Congress has unequivocally told
09:11:15 us are tipped employment.
09:11:16 The rule goes a step father. They say that if
09:11:21 you're -- forget side work. We're not talking about now
09:11:23 about the concerns about evading and having servers do
09:11:26 janitorial work. The simple act of waiting for customers
09:11:29 to arrive. So a restaurant has a server, it's a slow day.
09:11:32 No customers come in or one or two customers come in, and

09:11:36 the server is not assigned other tasks, not assigned
09:11:39 cleaning, not assigned rolling silverware. Just stand
09:11:43 there and wait for the customers to come and when the
09:11:45 customers come in, serve them. If that takes up more than
09:11:47 20 percent of the server's week, the department says that
09:11:50 counts -- that time is in that second category of directly
09:11:53 supporting tipped activity.
09:11:54 So simply by virtue of it being slow, if they're
09:11:58 -- for 20 percent of the time during the week, if there
09:12:00 are no customers to serve, even if the server is not
09:12:03 assigned any other task of any other occupation, the
09:12:06 department takes the position in this regulation -- and
09:12:08 that is at 86 Federal Register, page 60130. The
09:12:15 department says that downtime is directly supporting
09:12:19 tipped activity, but it's not tip-generating activity
09:12:22 itself. It's in that second category.
09:12:23 So the department says you lose the ability as an
09:12:26 employer to take the tip credit and to pay that person
09:12:29 less than the minimum wage, even if the employee is
09:12:32 earning more than enough in tips in the times when the
09:12:35 customers are in the restaurant. There's zero indication
09:12:38 that the -- that Congress thought this was a problem the
09:12:40 department needed to solve, or that the department had the
09:12:42 authority to say that you're no longer in the occupation
09:12:46 of server simply because you're waiting for customers to

09:12:48 arrive.

09:12:49 The idea that Congress didn't understand that
09:12:52 sometimes restaurants are busy and sometimes they're not,
09:12:54 that's silly. Of course Congress understood that. This
09:12:57 is not a complex industry. And here, the department has
09:13:01 solved many problems that were not part of the statute. I
09:13:05 mean, a lot of this regulation, in fact, the entire
09:13:07 regulation is a solution in search of a problem because
09:13:09 there is no problem. Because these employees by
09:13:13 hypothesis receive between their tips and their cash wage
09:13:18 at least minimum wage over the course of the workweek, and
09:13:19 if they do not, but employer has to under the FLSA make up
09:13:23 the difference.

09:13:23 So the concern about evading, the concern
09:13:26 expressed in the government's brief about an employee who
09:13:29 is brought in, hired nominally as a server but spends all
09:13:33 day mowing the lawn, first of all, there's no indication
09:13:35 that in the 55 years since the department issued its dual
09:13:39 jobs regulation originally there's been a single instance
09:13:42 of a restaurant employee spending all day mowing a lawn.
09:13:45 It's kind of a silly example.

09:13:47 But the broader point is that to the extent we're
09:13:49 dealing with sham situations, an employee is given a
09:13:53 nominal title but given job duties that simply doesn't
09:13:56 line up with that, somebody who's called a server hired as

09:13:58 the server, but spending their whole shift in the kitchen,
09:14:01 washing dishes or cooking food, that's easily dealt with
09:14:04 that. That's a sham situation that the courts are easily
09:14:07 able to sort out.
09:14:08 But the regulation doesn't do that. The
09:14:10 regulation doesn't tailor itself to trying to weed out
09:14:12 those sham situations. Instead, the regulation says, in
09:14:16 effect, we don't care what tasks these occupations
09:14:22 historically have performed. We don't care whether
09:14:25 preparing salads, or cleaning restrooms, or any of the
09:14:29 activities that we highlight in the briefing are actually
09:14:33 part of these jobs. We are going to define tipped
09:14:35 occupation as a special term and exclude anything that
09:14:38 doesn't fit in our world view.
09:14:40 So I would go to the next exhibit, if I may, and
09:14:46 this is Plaintiffs' Exhibit 2. This is the O*NET report
09:14:53 for waiters and waitresses or servers. This has been, for
09:14:59 example, submitted as an exhibit to our complaint
09:15:01 originally. The highlighting is what we've added. That
09:15:03 was not in the original exhibit. We've done this for
09:15:05 reference.
09:15:06 The O*NET database -- and we're not suggesting
09:15:08 that O*NET is the be all, end all, or is legally binding.
09:15:12 O*NET is historically, though, a database that the
09:15:15 Department of Labor itself sponsors. The department's own

09:15:17 employment and training administration uses O*NET,
09:15:21 sponsors O*NET, and looks to it as a database for what
09:15:24 tasks people perform in these various occupational
09:15:28 categories. So to the extent that the department is
09:15:30 interested in and is trying in some sense to define what
09:15:33 an occupation is, one source of information is, well, what
09:15:37 is the occupation? What tasks do these occupations
09:15:41 actually perform?
09:15:41 We have this detailed report here, and when we
09:15:44 see the highlighted tasks, there are a number on the
09:15:48 screen: Removing dishes and glasses from tables or
09:15:49 counters and take them to kitchen for cleaning, prepare
09:15:52 tables for meals, including setting up items such as
09:15:55 linens, silverware and glassware, perform cleaning duties,
09:15:59 roll silverware, and so on. We get to the next page:
09:16:05 Perform food preparation duties, such as preparing salads,
09:16:09 appetizers and cold dishes, portioning desserts and
09:16:12 brewing coffee, garnish and decorate dishes in preparation
09:16:14 for serving.
09:16:15 So preparing salads, one of the actual duties
09:16:20 that the department says is not part of the server
09:16:22 occupation, the data that the department supports says
09:16:25 otherwise. And the list goes on and on. We have others
09:16:28 in this same exhibit in the detailed work activities
09:16:30 category. We see cook foods, clean food service areas.

09:16:35 We see prepare foods for cooking or serving, clean food
09:16:38 preparation areas, facilities, or equipment.
09:16:41 So the point in all this is that these are duties
09:16:45 that even though the department says we are not going to
09:16:48 accept them, in reality, as a matter of fact, these are
09:16:53 normal parts of these occupations. We pull up Exhibit 3
09:16:56 and that is the O*NET report for bartenders. We see some
09:17:01 more things here. We've highlighted these. And this also
09:17:03 is an exhibit to the complaint, minus the highlighting.
09:17:05 When we see the task list, clean bars, work areas
09:17:09 and tables. Stock bar with beer, wine, and liquor, and so
09:17:13 on. We see prepare appetizers such as pickles, cheese and
09:17:16 cold meats. We go into the detailed task report, which is
09:17:20 farther down in the exhibit. Clean tableware, clean food
09:17:25 service areas, prepare foods for cooking or serving, cook
09:17:29 foods. So these are things that the Department of Labor
09:17:31 has by virtue of ipse dixit said are not part of these
09:17:37 occupations, even though the data indicates otherwise.
09:17:39 This all began -- and I don't have an exhibit for it, but
09:17:42 it was part of the record in terms of it's Exhibit 1 to
09:17:46 the government's submission.
09:17:48 So the department issued the original dual jobs
09:17:52 regulation in 1967. And by the way, this is ECF 20, at
09:17:56 page 52 of the ECF filing. We heard nothing about the
09:18:01 dual jobs issue until 1979, after the department issued

its regulation. In 1979, the Department of Labor issued an opinion letter, and that's Exhibit 1 to the government's opposition to our preliminary injunction motion.

And what they said was -- without citing any authority or any analysis, they analyze the situation where a restaurant had a waitress or waitresses who reported to work two hours, and I'm quoting from the opinion letter here, before the doors are opened to the public to prepare the vegetables for the salad bar. What the department says -- and this is pulled from whole cloth in the last paragraph of this opinion letter, it says, quote, since it is our opinion that salad preparation activities are essentially the activities performed by chefs, no tip credit may be taken for the time spent in preparing vegetables for the salad bar.

Made up out of whole cloth, not referencing any provision of the FLSA, and not referencing any factual data, anything -- this is other than Herbert Cohen, the assistant administrator at the time, his own personal opinion of what the work of chefs is. And yet, when we look at the work that chefs actually do and the work that servers actually do, there's significant overlap in these occupations. Preparing salads is one of the items specifically called out as a task that servers perform.

09:19:21 So they began this activity, the Department of
09:19:25 Labor did, in 1979. They followed through with further
09:19:29 exhibits that are in the government's filing, Exhibit 2
09:19:31 and so on, the different opinion letters, where they built
09:19:33 on this concept incrementally, dealing with issues of what
09:19:38 about side work after a restaurant is closed, or what
09:19:41 about employees who have 35, or 30, or 40 percent of their
09:19:45 time in the course of a day spent on opening activities
09:19:48 where it was just a particular employee assigned those
09:19:51 tasks and not tasks that were generally assigned to all
09:19:53 the servers.
09:19:54 So the department incrementally built on this.
09:19:57 And then, in 1988 the department issued its field
09:20:00 operations handbook section on this topic where it really,
09:20:03 for the first time, set forth three categories of
09:20:07 activity. Those are different categories from what is in
09:20:10 the final rule now. They're different categories from
09:20:12 what had been called the 80/20 rule in the past, even
09:20:14 though it wasn't an administrative rule. It was really a
09:20:16 sub-regulatory position.
09:20:18 But it was this 1988 handbook provision, and that
09:20:22 appears at Exhibit 4 of ECF 20 of the government's
09:20:26 opposition, and that's at page 57 of the ECF filing.
09:20:31 That's where the department issued for the first time this
09:20:33 notion of a 20 percent cap on related activities. That's

09:20:38 a category that has morphed with some changes into the
09:20:41 second category of activity currently seen in the final
09:20:44 rule that we're dealing with now, which is activity that
09:20:47 directly supports tip-producing activities.
09:20:50 So the department made that up without reference
09:20:54 to any data, without reference to any factual analysis of
09:20:59 how much time on these tasks is typical in these
09:21:02 industries. What do people actually do in these jobs?
09:21:05 The department has no expertise in that. It's conducted
09:21:08 no study of those issues. They don't dispute that fact.
09:21:10 They say as a matter of policy, they can set up a 20
09:21:14 percent tolerance.
09:21:14 But then, that bumps up against what the
09:21:17 statutory verbiage is. We have Congress saying if you
09:21:20 make $30 a month or more in the occupation in which you're
09:21:23 engaged, you are a tipped employee, and therefore, it is
09:21:27 appropriate and fair for the employer to treat the tips
09:21:31 that you've received as wages under the FLSA for purposes
09:21:35 of satisfying the minimum wage obligation. There's
09:21:37 nothing in that provision in the FLSA that suggests that
09:21:40 the Department of Labor has the authority to slice and
09:21:43 dice the duties of a position, of an occupation, a single
09:21:47 occupation like server, or bartender, or busser, and
09:21:50 divide those out and parse them in a way that renders
09:21:53 somebody who spends a hundred percent of his or her time

09:21:56 doing tasks that are by any measure appropriate for that
09:21:59 occupation. I'm not talking about mowing the lawns or
09:22:02 doing anything strange that we would not normally expect a
09:22:05 server to do, but tasks that even the department would
09:22:07 concede are normal server work. We'll set aside cleaning
09:22:11 the bathrooms for a moment, but everything else, preparing
09:22:13 the food and some of the other things that -- even if we
09:22:15 forget the preparing the food, because the department
09:22:18 takes issue with that, the other activities, the rolling
09:22:21 silverware and the other side work activities that the
09:22:23 department would agree are part of this position.
09:22:27 If an employee spends a hundred percent of his or
09:22:31 her time in the workweek doing just those activities and
09:22:33 has no shift where he or she is spending time exclusively
09:22:36 in the kitchen, washing dishes or doing something outside
09:22:40 the occupation, the department would nonetheless say that
09:22:43 employee is not subject to the tip credit because of this
09:22:47 20 percent standard or this 30-minute rule that the
09:22:49 department has if the employee happens to have a mix of
09:22:54 tasks that week that exceeds those thresholds. The
09:22:56 department has no authority to do that. There's no
09:22:58 problem under the FLSA relevant to that issue.
09:23:00 There's no indication that Congress delegated to
09:23:03 DOL the authority to micromanage tasks at the restaurant
09:23:06 level. And to the extent that the department is concerned

about sham activities, the employers calling somebody a server and giving them other duties that have nothing to do with being a server, that can be dealt with by a rule that's very different from what we have here that doesn't turn pure server time, pure bartender time, pure busser time into something other than tipped activity.

So the regulations sweeps too broadly. It doesn't tailor itself to the problem that they claim they're solving. And they don't in any way tether what they're doing to the verbiage of the FLSA. They claim ambiguity in the verbiage we talked about, but then, the regulation doesn't define those terms and doesn't address the ambiguity. It's not focused on that ambiguity. It's focused on something else. It's focused on the policy rationale of trying to raise the wages and raise the overall earnings of tipped employees. Again, a laudable goal, but not anything embedded in the FLSA; and, so, the department does not have the authority to do this.

At this point, I'd like to turn to the next exhibit, which is the declaration of Angelo Amador. This is -- this was submitted as ECF 12-1. We submitted it with our preliminary injunction papers, and his declaration begins at page 54 of that ECF filing. It's Exhibit 5 to our appendix. And we have Mr. Amador here today to testify. And if the Court will hear the

09:24:31 testimony, I would just start by showing the highlighted
09:24:34 portions of his declaration to give the background as to
09:24:38 who he is and what he does. We've covered a little bit in
09:24:41 the direct.
09:24:41 But what he talks about in the declaration is --
09:24:45 and we've got the key verbiage highlighted. The enormous
09:24:49 impact of this regulation on his members, the size of the
09:24:53 industry, the devastating effects of the pandemic on the
09:24:56 industry, and the difficulty of complying with this
09:25:00 regulation -- and, more specifically, it's not just the
09:25:03 compliance that's the challenge because I think if you
09:25:06 were to ask most restaurants today, they'd say our
09:25:08 employees spend less than 10 percent of their -- less
09:25:11 than, sorry, 20 percent of their time on side work. Our
09:25:15 employees don't typically spend 30 minutes or more in a
09:25:18 single block of time on side work.
09:25:20 The challenge, though, the practical reality
09:25:24 where the rubber meets the road in this issue is, unless
09:25:25 an employer maintains detailed records of the time spent
09:25:28 in these different categories of tip-producing activity,
09:25:31 activity that directly supports tip-producing activity,
09:25:34 and then, other, the employer has no defense when an
09:25:37 employee files a boilerplate FLSA collective action
09:25:42 complaint and says, well, I routinely spent 30 percent of
09:25:45 my time, my estimate, on side work. We see that complaint

09:25:47 all the time. And if you don't have records as an
09:25:50 employer that says, well, no. We maintained a record and
09:25:53 we can show you spent only 16 percent of your time, if you
09:25:55 don't have that record, and no employer has that record,
09:25:58 then technologically, it is either impossible or
09:26:03 economically infeasible to maintain that record, then
09:26:07 you're off to the races. Virtually every court in the
09:26:11 country, perhaps with the exception of district courts in
09:26:13 the Fifth Circuit, will certify that class. They will say
09:26:16 if an employee says this happened to me and I believe it
09:26:19 happened to other employees similarly situated, most
09:26:22 courts will apply a modest factual showing standard at the
09:26:26 first stage of FLSA collective action, notice will go out
09:26:28 to all of that employer's tipped employees, and we're off
09:26:31 to the races. I'm sorry.
09:26:32 MR. WALKER: Sorry, your Honor. I do just want
09:26:34 to raise an objection to this particular use of this
09:26:37 exhibit. This is an APA record review case. So when
09:26:39 we're looking at the merits arguments in the case, the
09:26:43 likelihood of success on the merits, any review of the
09:26:46 Court would be limited to the administrative record that
09:26:48 was before the agency at the time that it made the
09:26:50 decision. I understand that Mr. Amador's declaration may
09:26:53 be relevant to the issue of irreparable harm, but I don't
09:26:58 think it's relevant to the issue of the merits of the APA

09:27:00 claim.

09:27:00 So we object to the use of this exhibit for that

09:27:02 purpose.

09:27:03 MR. DECAMP: Your Honor, if I may, we're

09:27:04 introducing this solely -- this exhibit solely for the

09:27:07 irreparable harm issue, not for merits of the claim. We

09:27:10 agree that the -- to the scope of the APA record.

09:27:12 THE COURT: Okay. Thank you.

09:27:13 MR. DECAMP: May I proceed?

09:27:14 THE COURT: Sure.

09:27:15 MR. DECAMP: With the declaration? Okay.

09:27:17 So the practical reality is -- and Mr. Amador

09:27:21 will address this in his live testimony -- if an employer,

09:27:25 especially a small to medium size restaurant business --

09:27:28 we're not talking about the giant restaurants. They've

09:27:30 got inhouse counsel. They have fairly -- they're fairly

09:27:33 well funded, most of them. But when we're talking about

09:27:36 small and medium size restaurant operators who don't have

09:27:39 inhouse counsel, as Mr. Amador will indicate, who don't

09:27:42 have $500,000 sitting around to pay lawyers to fight an

09:27:46 FLSA case, even getting hit with one of these FLSA

09:27:49 collective actions that gets certified is enough to

09:27:52 bankrupt a lot of businesses, especially now that we're in

09:27:55 the pandemic where the restaurant industry is really on

09:27:57 the edge.

09:27:59 You'll hear testimony from Mr. Amador about what
09:28:00 the effect of the pandemic has been on this industry and
09:28:02 the number of businesses that have gone out of business.
09:28:05 This is an industry that's fighting for its life. And
09:28:07 we're not in any way suggesting that the wages of
09:28:10 employees are unimportant. Absolutely not. Of course
09:28:12 they're important. It's guaranteed by federal law.
09:28:15 But when we're talking about harms, we're talking
09:28:18 about employees who -- if this regulation continues to go
09:28:21 forward, they'll get their minimum wage, arguably plus,
09:28:28 but if the regulation gets enjoined, they'll still get at
09:28:31 least the minimum wage they're guaranteed. They will
09:28:33 still receive between their tips and their cash wage from
09:28:36 the employer, at least federal minimum wage across all the
09:28:40 hours that they've worked. So they are just as well
09:28:42 protected in the absence of this regulation as every other
09:28:45 minimum wage employee.
09:28:46 The only difference between tipped employees
09:28:49 under the FLSA and non-tipped employees is that Congress
09:28:51 in 1966 and since has recognized that in certain
09:28:57 industries, tipping is common, and therefore, employees
09:28:59 have two streams of income from that employment. The
09:29:03 direct wages from their employer and customer tips. And
09:29:06 as long as those customer tips exceed the de minimis
09:29:10 threshold, the $30 a month, it's appropriate to treat that

09:29:14 1 income from the tips as part of the wage. That's all that
09:29:17 2 the tip credit does. It's another way of proving minimum
09:29:21 3 wage.
09:29:21 4 But when we're talking about the harm to the
09:29:23 5 restaurant industry, every day, we see restaurants go
09:29:25 6 bankrupt. This industry has very tight margins. They're
09:29:29 7 dealing with a workforce now that is suffering from COVID.
09:29:32 8 They're dealing with shortages, labor shortages, supply
09:29:36 9 chain shortages, inflation, customers that aren't
09:29:40 10 necessarily going to restaurants, the whole mask issue. A
09:29:43 11 lot of people don't want to go to public places and eating
09:29:46 12 at restaurants. The industry is already on the ropes.
09:29:48 13 This regulation -- and the information you'll
09:29:51 14 hear from Mr. Amador will confirm this. This regulation
09:29:54 15 is putting extreme pressure on these businesses because
09:29:57 16 the practical reality is, if they don't maintain the
09:30:01 17 records sufficient to prove the amount of time spent in
09:30:05 18 these different categories of activity, they are
09:30:08 19 subjecting themselves to FLSA litigation where even if
09:30:11 20 they have complied, even if the reality, the objective
09:30:16 21 truth of the situation is that the employees are spending
09:30:18 22 less time on these tasks than the threshold set forth in
09:30:21 23 the final rule, if an employer can't prove that at the
09:30:25 24 outset of the case in a sufficient way to shut down the
09:30:27 25 litigation, the employer will very likely go bankrupt.

09:30:31 That is an irreparable harm.

09:30:33 The time that an employer has to spend now, the
09:30:35 resources they have to devote now to this issue, the
09:30:40 paying employees full minimum wage, that's a cash wage
09:30:43 rather than taking the tip credit because of the need to
09:30:46 avoid this litigation risk, all of that is harm that if
09:30:49 this regulation is struck, either in this court or later
09:30:53 in the process, that's harm that the restaurant can't get
09:30:57 back. If they go out of business, there's no way to undo
09:31:00 that harm. And the courts have recognized that compliance
09:31:05 -- forced compliance with an invalidated rule or a rule
09:31:09 that's ultimately invalidated is an irreparable harm.

09:31:12 So this is -- in terms of the balance of harms, I
09:31:15 think it will be clear that there's no harm to the
09:31:18 government in having this regulation preliminarily
09:31:21 enjoined. These workers will be protected by minimum wage
09:31:24 throughout this litigation. And there's extreme harm to
09:31:28 these businesses that are fighting for their survival,
09:31:31 including fighting to maintain the jobs of the workers
09:31:34 that the department says it's trying to protect.

09:31:35 So at this point, with the Court's permission,
09:31:38 I'd like to call Angelo Amador to testify.

09:31:40 MR. WALKER: This was the subject of my earlier
09:31:42 objection, your Honor. As I said, this witness and I
09:31:45 think the fact that there would be witnesses at the

09:31:47 hearing today was not disclosed to the government till
09:31:50 5:30 p.m. yesterday. I would also note that Mr. Amador is
09:31:53 a counsel of record, an advocate on behalf of the
09:31:55 plaintiff in this case, and it would be inappropriate for
09:31:58 him to also serve as a witness.
09:32:03 MR. DECAMP: Your Honor, we believe that Mr.
09:32:04 Amador, first of all, is a client, in addition to being --
09:32:08 he's a lawyer, but he's also a client. He's -- as he'll
09:32:11 testify, he's the executive director of the Restaurant Law
09:32:14 Center, so he is the client. He is at the heart of a
09:32:17 trade association that deals with members on these issues
09:32:21 every day. He is extremely knowledgeable about these
09:32:23 issues and can speak factually on these issues.
09:32:26 In addition, he will not be presenting oral
09:32:28 argument to the Court. He is not in the role of the
09:32:33 ethically conflicted advocate witness. That's not going
09:32:35 to happen here.
09:32:36 THE COURT: He already is. He's signed the
09:32:39 pleadings. I mean, he's on the pleadings.
09:32:42 MR. DECAMP: He's on the pleadings, but again,
09:32:43 courts have said that that issue of the advocate as
09:32:47 witness only becomes a problem if the credibility of the
09:32:52 lawyer is likely to present a challenge to the factfinder.
09:32:54 Here, we're not dealing with a jury. Here, we're dealing
09:32:57 with the Court. Certainly the Court is able to

09:33:00 distinguish any issues there and not be confused by the
09:33:02 capacity in which Mr. Amador is testifying. And he has
09:33:06 important, relevant factual information regarding the
09:33:10 issues that his industry is facing and he is a client.
09:33:14 THE COURT: All right. I'll allow the testimony
09:33:16 and reserve the ruling on whether or not I'll use it.
09:33:19 MR. DECAMP: Thank you, your Honor. Where would
09:33:21 you like Mr. Amador to testify from?
09:33:23 THE COURT: The witness box here would be great.
09:33:25 If you'd come forward, sir.
09:33:40 THE CLERK: You do solemnly swear or affirm that
09:33:40 the testimony which you may give in the case now before
09:33:40 the Court shall be the truth, the whole truth, and nothing
09:33:44 but the truth?
09:33:44 THE WITNESS: I do.
09:33:51 ANGELO AMADOR, called by the Movant, duly sworn.
09:33:51 DIRECT EXAMINATION
09:33:53 BY MR. DECAMP:
09:33:53 Q. Good morning, Mr. Amador.
09:33:54 A. Good morning.
09:33:54 Q. Could you please state and spell your full name for
09:33:56 the record.
09:33:57 A. My name is Angelo Amador, A-N-G-E-L-O, A-M-A-D-O-R.
09:34:03 Q. What is your current occupation?
09:34:05 A. My current occupation, I'm the Executive Director of

09:34:08 the Restaurant Law Center.
09:34:10 Q. How long have you been in that role?
09:34:12 A. I've been in that role unofficially since 2015 and
09:34:16 then, officially when it was incorporated in 2016,
09:34:19 September.
09:34:20 Q. What are your job duties in that role?
09:34:22 A. I am the spokesperson for the Restaurant Law Center.
09:34:26 I'm the main individual in charge of running the law
09:34:29 center, and representing our members, and talking to our
09:34:33 members on a daily basis to make sure that they are
09:34:38 represented and educated.
09:34:38 Q. How long have you been working with the restaurant
09:34:40 industry?
09:34:40 A. I've been working directly with either the National
09:34:45 Restaurant Association or the Restaurant Law Center since
09:34:48 2010. So twelve -- going on twelve years now.
09:34:50 Q. And what is the Restaurant Law Center?
09:34:52 A. The Restaurant Law Center is an independent
09:34:57 organization, a 501(c)(6) to help members of the
09:35:01 restaurant industry be in compliance and be educated on
09:35:05 how to avoid the pitfalls of regulatory compliance.
09:35:10 Q. Approximately how many members does the Restaurant
09:35:12 Law Center have?
09:35:13 A. Jointly with our state restaurant association, the
09:35:17 District of Columbia, the Commonwealth of Puerto Rico,

about 500,000.

Q. And what is the average size in terms of employees of your Restaurant Law Center members?

A. Well, we consider them medium to small. Under the Small Business Administration, almost all of them will be small business but, you know, midrange for the way people view them.

Q. Do most of your members have inhouse counsel, legal counsel to advise them on FLSA compliance?

A. Most of our members do not, and a lot of our members don't even have HR, human resources departments.

Q. What does the Restaurant Law Center do for its members, if anything?

A. We provide a lot of compliance information. We hold webinars. We hold in-person meetings. We have yearly summit and, of course, you know, answering calls and e-mails on a daily basis.

Q. What types of topics does the Restaurant Law Center discuss at meetings with its members?

A. We discuss from state and local to federal laws and regulations whether there is -- you know, be in Chicago, in California. And then, of course, you know, a lot -- we are very labor-intensive industry, so a lot of regulations from the Department of Labor.

Q. To your, knowledge, do Restaurant Law Center members

09:36:35 use the FLSA's tip credit?
09:36:37 A. A lot our members -- not all of them do, but a lot of
09:36:41 our members do.
09:36:42 Q. Did the Restaurant Law Center submit comments in
09:36:46 connection with the Department of Labor's rulemaking that
09:36:48 led to the final rule that's at issue in this litigation?
09:36:50 A. We have been submitting comments to the proposals and
09:36:53 others and yes, to the NPRM on this particular rule.
09:36:56 Q. Did the Restaurant Law Center members also submit
09:36:59 comments in connection with the same rulemaking
09:37:01 proceeding?
09:37:01 A. They did. I don't know if all of the restaurants
09:37:03 have submitted comments are members, but I know that about
09:37:06 78 to 80 percent of the comments submitted were from
09:37:10 restaurants or, as we call them, food service
09:37:12 establishments.
09:37:13 Q. What is your understanding, if any, of how the final
09:37:16 rule affects the Restaurant Law Center and its members?
09:37:19 A. It has a direct impact on those that take the tip
09:37:23 credit. You know, we keep getting calls, you know, they
09:37:27 find it confusing because, frankly, we think some of the
09:37:31 parts are contradictory. So it has a direct impact on how
09:37:34 they run their business, and how they manage the work of
09:37:36 the employees, and how they supervise and keep track of
09:37:39 hours and others.

09:37:41 Q. How has the COVID-19 pandemic affected the industry?
09:37:45 A. Well, there's a lot of restaurants that wouldn't be
09:37:48 -- there's a lot of restaurants that have closed. A lot
09:37:50 of restaurants that have closed permanently. And we
09:37:54 requested and received help from the -- what is called
09:37:59 Restaurant Revitalization Fund from Congress to be able to
09:38:02 help some stay open, in addition to other federal programs
09:38:05 that help keep the doors open.
09:38:10 Q. Does the COVID-19 pandemic affect in any way how the
09:38:14 final rule impacts the Restaurant Law Center's members?
09:38:17 A. Well, the COVID-19 has a direct impact on everything,
09:38:21 in particular, because a lot of the savings that they had
09:38:25 for -- not something like this. No one expected something
09:38:29 like this, but for the bad times ended up coming and they
09:38:34 have been depleted. So they really have no reserves at
09:38:39 this point.
09:38:39 Q. As a practical matter, what's so difficult about
09:38:43 tracking the time that employees spend on tip-producing
09:38:46 activity, activity that directly supports tip-producing
09:38:50 activity, and non-tipped activity?
09:38:52 A. It is one of tracking and keeping records. The most
09:38:57 important comment that I often get is when you look at the
09:39:01 three categories under the task and the tip occupation as
09:39:05 defined in the final rule, restaurants tell me they go
09:39:08 from one to the other constantly from, you know, in a span

09:39:13 of six minutes, they would go from serving a table to
09:39:18 waiting for customers, and they have to be tracked
09:39:23 separately and that becomes very difficult.
09:39:26 Q. To your knowledge, do existing timekeeping systems
09:39:29 have the capacity to track those different categories of
09:39:32 activity?
09:39:33 A. What my members are telling me is that it does not.
09:39:36 That it doesn't exist, particularly because of how quickly
09:39:39 you move from one category to the other.
09:39:42 Q. The final rule at issue in this case was issued by
09:39:46 the Department of Labor at the end of October 2021. You
09:39:49 didn't file the lawsuit here until beginning of December.
09:39:53 So roughly a month later, four or five weeks later. What
09:39:56 is the reason for the delay?
09:39:58 A. Well, we did not view it as a delay. You know, you
09:40:01 have a process that we need to follow. You know, we were
09:40:04 working with co-plaintiff, the Texas Restaurant
09:40:07 Association. But in addition, we had the unprecedented --
09:40:10 we were actually not even expecting -- when it came out,
09:40:13 we were expecting the OSHA ETS vaccination, and that
09:40:17 actually came within a week of this being issued. So we
09:40:21 were looking at the unprecedented action by the Restaurant
09:40:25 Law Center to challenging two rules at the same time from
09:40:28 the federal government.
09:40:31 We ended up seeing that other trade associations

09:40:34 filed suit on the ETS, so we refrain from doing that and
09:40:38 concentrated on this one. But, you know, there's several
09:40:41 levels of approval by the Restaurant Law Center board, the
09:40:44 Texas Restaurant Association, the Executive Committee of
09:40:48 the National Restaurant Association. It's a major
09:40:50 endeavor to sue the federal government and, you know, we
09:40:52 don't think 30 days is a long time, but I know some
09:40:56 disagree.
09:40:58 Q. I have no further questions, your Honor.
09:41:00 THE COURT: Mr. Walker.
09:41:03 MR. WALKER: Thank you, your Honor. Just to
09:41:05 augment my objection before I begin the cross-examination,
09:41:08 I would like to note that plaintiffs' counsel has
09:41:12 described the way I believe Mr. Amador can testify,
09:41:15 notwithstanding his role as counsel of record in this
09:41:17 case. They've provided no explanation for why the
09:41:19 disclosure of Mr. Amador as a witness might have been made
09:41:23 before 5:30 p.m. last night or why they could not have
09:41:26 disclosed that they were going to present a witness before
09:41:26 5:30 p.m. last night.
09:41:30 Also, I'd just note Mr. Amador has provided new
09:41:32 evidence outside the scope of his declaration as part of
09:41:34 his testimony today that could have been submitted, but
09:41:36 was not submitted, by the plaintiffs' opening brief or the
09:41:39 reply brief.

09:41:39 THE COURT: I'll note your objection. Thank you.

09:41:58 CROSS-EXAMINATION

09:42:02 BY MR. WALKER:

09:42:02 Q. Mr. Amador, do you have a copy of your declaration

09:42:04 handy?

09:42:05 A. No, I do not, but I can --

09:42:08 Q. I can provide that to you.

09:42:10 A. Thank you.

09:42:10 Q. With the Court's permission.

09:42:12 THE COURT: Sure.

09:42:18 MR. WALKER: I'm happy to provide a copy to the

09:42:20 Court, too, ECF 12-1, beginning on page 55. Would you

09:42:24 like a copy or would your Honor --

09:42:25 THE COURT: That's okay. I have everything here.

09:42:27 Thank you.

09:42:32 MR. DECAMP: I have it up on the screen, if you'd

09:42:35 like.

09:42:35 THE WITNESS: Thank you.

09:42:42 Q. (BY MR. WALKER) Mr. Amador, if would you please turn

09:42:58 to a paragraph 15 of your declaration that is on page 5 of

09:43:01 12. I just want to note in this paragraph, you describe a

09:43:11 specific call that you had with members on August 3rd,

09:43:14 2021, which discuss certain cost concerns with the final

09:43:18 rule, correct?

09:43:19 A. On August -- oh, you mean paragraph 14? You

09:43:23 mentioned 15.
09:43:23 Q. Correct.
09:43:24 A. Sorry, I read 15.
09:43:25 Q. Paragraph 13, you're describing an August 3rd, 2021
09:43:29 call?
09:43:29 A. Uh-huh.
09:43:29 Q. You'll acknowledge, won't you, that August 3rd, 2021
09:43:32 is before the final rule was published, correct?
09:43:34 A. Correct.
09:43:37 Q. So what you're actually discussing on this call was
09:43:39 the proposed --
09:43:40 A. The NPRM, correct.
09:43:40 Q. And there were changes made to the proposed rule in
09:43:43 the final rule; isn't that correct?
09:43:44 A. Minor changes, correct.
09:43:46 Q. If you will, turn to page -- paragraph 16 or direct
09:43:49 your attention to paragraph 16 that starts on page 5 and
09:43:52 continues to page 6. You state here that you were unable
09:44:00 to attend a meeting to oppose a bill proposed by New York
09:44:04 state because of your attention to the final rule; is that
09:44:08 correct?
09:44:08 A. Correct.
09:44:09 Q. What was the date of that meeting?
09:44:12 A. I cannot recall right now.
09:44:14 Q. Can you recall --

09:44:15 A. The exact date.
09:44:15 Q. -- if it was before or after the publication of the
09:44:17 final rule?
09:44:18 A. I cannot recall right now. Sorry.
09:44:20 Q. You also say you were unable to oppose natural gas
09:44:24 bans proposed by the state of California or to participate
09:44:26 in strategic advice on similar bans proposed by other
09:44:30 states. What was the date of that activity?
09:44:32 A. I cannot recall the dates. No.
09:44:34 Q. Can you recall if it was before or after publication
09:44:37 of the final rule?
09:44:38 A. It could have been before, but I cannot recall.
09:44:40 Q. If you'd turn your attention on paragraph 19, and
09:44:43 this is where you describe various categories of costs
09:44:46 that you say your member restaurants will incur as a
09:44:49 result of the final rule, correct?
09:44:50 A. Correct.
09:44:52 Q. Subparagraph A deals with regulatory familiarization,
09:44:56 correct?
09:44:57 A. Correct.
09:44:58 Q. And you state here that your members will require
09:45:02 significant time to read and become familiar with the
09:45:06 final rule, correct?
09:45:07 A. Correct.
09:45:08 Q. You're referring there to the final rule as published

09:45:11 in the Federal Register, correct?
09:45:12 A. Correct.
09:45:13 Q. And you don't take into any account here in your
09:45:17 declaration the compliance guidance that's published by
09:45:21 the Department of Labor on their website?
09:45:23 A. No. I take in consideration everything that is being
09:45:27 published. They still have questions on compliance.
09:45:30 Q. You don't mention anything about that compliance
09:45:32 guidance in your affidavit, do you?
09:45:34 A. I don't think I did. No.
09:45:36 Q. Okay. And you say you've confirmed this with your
09:45:40 members?
09:45:41 A. Correct.
09:45:42 Q. Can you identify a specific member that you -- that
09:45:45 has told you that they would have to spend significant
09:45:47 time reading and becoming familiar with the rule?
09:45:49 A. Absolutely. I've spoken with the general counsel
09:45:52 from Golden Corral. I've spoken with the general counsel
09:45:55 from Lettuce Entertain You, which are differing types of
09:46:01 brands that are independent. I have received feedback --
09:46:05 we have a webinar next week on the issue and people get to
09:46:08 put the lines, comments, and we have over around 300 right
09:46:15 now. We have people from all over the United States,
09:46:17 Cincinnati, Ohio, Montgomery, Alabama, saying the same
09:46:21 thing with regards to this rule.

09:46:24 Q. But you declined to mention any specific restaurants
09:46:26 in your declaration; is that correct?
09:46:27 A. This -- some of this feedback is still oncoming,
09:46:32 which is, you know, one of the reasons we wanted to update
09:46:34 the information as to what has happened. But yeah. No.
09:46:36 There are no names included there.
09:46:39 Q. Have any of the specific restaurants described to you
09:46:41 the specific recordkeeping -- or, I'm sorry, the specific
09:46:45 rule familiarization efforts and costs that they will have
09:46:48 to incur?
09:46:49 A. Yes, they have.
09:46:50 Q. Can you describe those in detail?
09:46:51 A. Yeah. They have talked to their IT departments,
09:46:56 trying to figure out how to keep track of the timing and
09:47:02 trying to understand, you know, what happens when the
09:47:05 restaurant is slow. You know, all of those things have
09:47:08 been described to them and they describe to me.
09:47:10 Q. We're talking about rule familiarization costs here,
09:47:14 correct?
09:47:14 A. Correct.
09:47:14 Q. The IT department is not going to be doing the rule
09:47:18 familiarization, correct?
09:47:19 A. With the rule familiarization, I can tell you, you
09:47:21 know, the comments are coming from -- people wouldn't be
09:47:23 doing a webinar if they understood what the regulation was

09:47:26 about.
09:47:26 Q. I'm asking if any specific member has provided you
09:47:29 information that you can describe in detail about
09:47:32 precisely what they're going to have to do to read and
09:47:35 comply with the rule and the costs that that is going to
09:47:37 incur.
09:47:37 A. They haven't been able to come up with a cost because
09:47:39 they don't really understand the rule yet, which is part
09:47:42 of the familiarization cost.
09:47:44 Q. But this rule has been in place for over a month now,
09:47:46 correct?
09:47:46 A. Correct.
09:47:47 Q. It's effective, correct?
09:47:48 A. It is effective.
09:47:49 Q. So that means the restaurants are obligated to comply
09:47:52 with it now and have been for over a month, correct?
09:47:54 A. Correct.
09:47:54 Q. And so, your testimony today is that your members
09:47:56 have not yet incurred any costs to become familiar with
09:47:59 the rule?
09:48:00 A. What was the question again?
09:48:03 Q. I said, is it your testimony today that you don't
09:48:05 know of any restaurant that has already incurred costs to
09:48:08 become familiar with this published and effective rule?
09:48:10 A. No. That is not my testimony. My testimony is that

09:48:14 they're incurring costs right now to become familiar with
09:48:17 the rule.
09:48:18 Q. But you can't right now describe any of those costs
09:48:21 in detail and precisely what is being --
09:48:22 A. No. I can tell you, they are talking to even
09:48:25 attorneys, and attorneys are not cheap to try to
09:48:27 understand the rule and come into compliance.
09:48:30 Q. Which restaurant are you aware of that has spoken to
09:48:32 an attorney?
09:48:32 A. Well, all of them that have contacted me from via
09:48:38 e-mail from -- not all of them. The ones that have
09:48:41 mentioned talking to attorneys, I imagine they're paying
09:48:44 their attorney for that.
09:48:45 Q. You imagine that yourself.
09:48:47 A. Well, I don't know many attorneys that work for free.
09:48:52 Q. Looking at paragraph C, you describe here -- or, I'm
09:48:55 sorry, let's go to paragraph B for preparation costs.
09:49:00 These are costs to prepare for the rule, correct?
09:49:02 A. Which one?
09:49:03 Q. Subparagraph B, beginning on page 7.
09:49:06 A. Correct.
09:49:07 Q. And as you said, this rule is currently in effect,
09:49:10 correct?
09:49:11 A. Correct.
09:49:11 Q. And has been for over a month.

09:49:13 A. Correct.
09:49:13 Q. So with these preparation costs have been already
09:49:17 incurred, wouldn't you agree?
09:49:18 A. They're being incurred.
09:49:20 Q. Are you aware of any specific restaurant that's
09:49:22 incurring specific preparation costs that you can describe
09:49:25 in detail today?
09:49:26 A. Yes. I have at least a couple that have commented in
09:49:32 -- for the webinar that they are now paying their bussers,
09:49:36 for example, the people that clean the tables, the full
09:49:39 minimum wage, instead of the tip credit, for that work
09:49:43 because they're afraid that they might not be in
09:49:45 compliance and might not be able to track the work
09:49:47 properly.
09:49:48 Q. I think you'll agree, won't you, that that would fall
09:49:50 under subparagraph C, increased wage costs?
09:49:54 A. Well, you can put it in either in my book. I mean,
09:49:57 it's preparation to be in compliance, and it is also
09:50:01 increased wage costs. You also have training that they're
09:50:04 giving managers on how to keep track of the work that the
09:50:06 servers are doing that would also be preparation costs.
09:50:09 Q. Can you describe any specific training by any
09:50:12 specific member here today that's been planned or
09:50:16 undertaken?
09:50:16 A. Yes. I have at least one member that have said that

09:50:18 they have to train their managers on keeping track. The
09:50:22 name, I don't have off the top of my head, but I could
09:50:25 look it up.
09:50:25 Q. You can't tell us which member that is?
09:50:27 A. I can give it to you afterwards if you want it.
09:50:30 Q. Can you describe in detail the training that they're
09:50:32 having to provide?
09:50:33 A. I have not been privy to the training. I just ask
09:50:36 them if they have provided the training.
09:50:40 Q. Looking at the increased wage cost, you describe a
09:50:45 particular Virginia member. Which restaurant is that?
09:50:47 A. I don't know from the top of my head. I remember it
09:50:51 was in Virginia.
09:50:52 Q. But you can't identify that member, specifically?
09:50:54 A. Not right now, no.
09:50:55 Q. Can you identify when you had this discussion with
09:50:57 the Virginia member?
09:50:59 A. No. I would have to go back and look at my calendar.
09:51:03 Q. Can you tell whether it was before or after
09:51:05 publication of the final rule?
09:51:07 A. I can't recall. No.
09:51:10 Q. Turning now to adjustment cost, you refer here
09:51:18 specifically to a larger member that you say needs to
09:51:20 build a team, correct?
09:51:22 A. Hold on. Let me read what you're referring to.

09:51:25 Q. Subparagraph D, on page 9.
09:51:34 A. Uh-huh.
09:51:34 Q. And can you identify that larger member that you
09:51:36 referred to there?
09:51:38 A. I will have to go back and look it up. I cannot tell
09:51:41 you right now which member it was.
09:51:42 Q. Can you tell when you had this conversation with the
09:51:44 larger member?
09:51:45 A. I've had many conversations with large members, but I
09:51:48 cannot recall which one --
09:51:50 Q. I guess --
09:51:50 A. -- specifically is this.
09:51:51 Q. Speaking specifically about the conversation where
09:51:54 you learned that the larger member would need to build
09:51:57 this team and create new policies training and job
09:52:02 descriptions.
09:52:02 A. I don't want to guess as to the member, but I can
09:52:06 find out and get back with you on that.
09:52:07 Q. And can you tell me when you had the conversation
09:52:09 about the need to create this team?
09:52:11 A. I don't know if it was before or after the rule
09:52:14 became effective.
09:52:15 Q. Can you tell me if it was before or after the
09:52:17 publication of the final rule?
09:52:19 A. I cannot because, again, a lot of these conversations

09:52:22 -- the conversations have been ongoing for months before
09:52:25 and after the rule became effective and the changes were
09:52:29 minor.
09:52:31 Q. So it could have been between publication of the
09:52:34 notice of proposed rule and then, the final rule, correct?
09:52:37 A. Definitely, one of them would have happened before,
09:52:40 but, you know, there have been conversations ongoing
09:52:42 after, as well.
09:52:44 Q. So I think the answer to my question was yes, that it
09:52:46 could have been between the publication of the proposed
09:52:49 rule and the publication of the final rule, correct?
09:52:51 A. Correct, but it actually came true because they're
09:52:54 telling me this is exactly what they're doing.
09:52:56 Q. When did they tell you that?
09:52:58 A. As late as two days ago, I was having the
09:53:02 conversation. I do recall perfectly was with Golden
09:53:06 Corral's, you know, counsel and all of the things that
09:53:09 they have to do with IT to be able to try to come into
09:53:12 compliance. And it's not really trying to come into
09:53:15 compliance. As you said, the rule is effective. I do
09:53:17 believe the members are in compliance. It's being able to
09:53:19 defend themselves against a lawsuit and being able to
09:53:22 prove that they're in compliance, which becomes very
09:53:24 difficult and expensive.
09:53:26 Q. So are you saying that the larger member that you

09:53:28 couldn't remember a few questions ago, you now remember is
09:53:31 Golden Corral?
09:53:32 A. No. I said that the one I spoke with two days ago
09:53:34 and told me the same thing, I can recall perfectly was
09:53:37 Golden Corral's, you know, counsel.
09:53:40 Q. So that's separate from what you're describing in
09:53:43 subparagraph D?
09:53:43 A. What I'm saying is that a lot of these conversations
09:53:45 and the conversation here, I don't know when this
09:53:47 particular conversation happened at this moment. I will
09:53:50 have to go back and look at my records.
09:53:58 Q. Similar question --
09:53:59 A. And again, there are similar conversations that I had
09:54:01 with other members, as well, saying the same thing.
09:54:04 Q. And then, turning to subparagraph E on page 10,
09:54:09 similar question. You note here that your members say you
09:54:12 will need to spend money to create new business and
09:54:19 staffing, correct?
09:54:20 A. Correct.
09:54:21 Q. Can you identify a specific member that you've had a
09:54:24 conversation about staffing with?
09:54:27 A. Again, you know, I have these conversations every
09:54:29 day. I cannot mention one specifically that on that
09:54:35 conversation. But I have plenty of conversations with
09:54:38 members that are telling me the same thing with regard to

09:54:41 staffing costs. If you are changing the structure and
09:54:44 you're paying somebody -- for example, you want to bring
09:54:49 the servers at 10:30 in morning, instead of 10:00, then
09:54:52 you're paying somebody else to do the setup that is a
09:54:55 whole different staffing model than what they have right
09:54:58 now.
09:54:58 Q. But you can't identify a specific conversation that
09:55:00 you've had with a specific member on this topic?
09:55:06 A. I can definitely talk about several. Again, you
09:55:11 know, I talked to Lettuce Entertain You. I talked to
09:55:15 Brinker, I talked to a number. And then, I talked to
09:55:18 Independence or get e-mails from Independence telling me
09:55:20 the same thing.
09:55:22 Q. Specifically with respect to the staffing issue?
09:55:25 A. Correct.
09:55:26 Q. And with respect to one of the members that you just
09:55:30 identified, can you identify the date on which you had
09:55:32 that conversation?
09:55:32 A. I cannot identify the exact date for -- this was done
09:55:37 for the declaration before. I can -- of course, my memory
09:55:42 is easier to recall things that happened recently.
09:55:44 Q. Can you identify a specific conversation that has
09:55:48 occurred after publication of the final rule?
09:55:50 A. Yes, I can.
09:55:51 Q. Which one's that?

09:55:53 A. I've been getting e-mails for the webinar that we
09:55:55 have next week where they are stating exactly this, that
09:55:59 they're paying other people not on the tip credit.
09:56:02 They're bringing people to do the setup work, and that is
09:56:06 different than the process they had before where they had
09:56:10 the server or the busser do certain types of work that was
09:56:15 within the O*NET description that they were covering under
09:56:17 the tip credit.
09:56:18 Q. Can you describe a specific member that has said that
09:56:21 to you after publication of the final rule?
09:56:24 A. I will have to look at my e-mails and the
09:56:26 registration for next week's webinar. But yes, I could.
09:56:31 I just don't have it right now with me.
09:56:32 Q. You're not able to do so today.
09:56:34 A. I will be able to do it today but not right now.
09:56:41 Q. Turning now to management costs in paragraph F on
09:56:45 page 10, you mentioned one chief legal officer who
09:56:49 estimates that 10 hours per week of management time will
09:56:52 have to be expended to comply with the final rule,
09:56:57 correct?
09:56:57 A. Correct.
09:56:57 Q. And which member is that, specifically?
09:56:59 A. I will have to go back and look at my notes but,
09:57:03 again, is similar to what they're all saying.
09:57:06 Q. But you can't identify the specific member today?

09:57:08 A. Not right now.
09:57:09 Q. Can you identify the date on which you had this
09:57:12 conversation?
09:57:12 A. Not right now.
09:57:14 Q. Can you -- so it could be at some point between the
09:57:18 issuance of the proposed rule and the final rule; isn't
09:57:20 that correct?
09:57:21 A. This particular one, it could have been.
09:57:24 Q. And can you say with specificity what's going to --
09:57:27 what this member told you management would be doing within
09:57:32 that 10 hours?
09:57:32 A. I mean, training alone, because it's continuous and
09:57:36 we have a high changing of jobs and staff, it's going to
09:57:44 be more than, you know, 10 hours. It will be like 10
09:57:48 hours, not 10 minutes, to train all the managers that have
09:57:50 the different shifts at the restaurants.
09:57:52 Q. Well, my question was, can you describe with
09:57:55 specificity what this member told you management would be
09:57:58 doing during this additional 10 hours?
09:58:01 A. With specificity, I mean, I don't know how specific
09:58:04 you want to be, but training alone, and conversations with
09:58:08 their staff, and changing the whole structure takes more
09:58:12 than 10 minutes.
09:58:15 Q. When you say 10 minutes, you're referring to the
09:58:17 estimate that the Department of Labor provided in the

09:58:19 rule?
09:58:19 A. Correct.
09:58:20 Q. That was an average, wasn't it?
09:58:22 A. Yeah. And I don't think in an average, no
09:58:25 restaurants -- I mean, for smaller restaurants, it's
09:58:28 actually more difficult. I have an e-mail and, again, I
09:58:31 can provide you the name from a restaurant that has 34
09:58:34 employees, and even everything they're doing, like, okay,
09:58:38 we don't know if we're in compliance or not. So I would
09:58:40 say for smaller restaurants, it's even more difficult than
09:58:43 for larger restaurants.
09:58:44 Q. It's an average across all establishments, though,
09:58:47 correct?
09:58:48 A. Yeah, but I don't see anybody taking 10 minutes in
09:58:51 training for this regulation. And I point out that the
09:58:55 Small Business Administration office advocacy agree with
09:58:58 us that this is way low average for this particular rule.
09:59:02 Q. That group of establishments from which they took the
09:59:04 average includes several establishments that do not take a
09:59:07 tip credit for any employees, doesn't it?
09:59:09 A. Oh, I don't know. But, you know, you have to comply
09:59:12 with the tip credit. It has to be establishments that use
09:59:14 the tip credit.
09:59:15 Q. You don't know that the group of establishments from
09:59:17 which the Department of Labor drew this average includes

09:59:20 several establishments that do not take a tip credit at
09:59:22 all?
09:59:23 A. I don't know if they consider Microsoft and IBM but,
09:59:27 you know, why would they care.
09:59:29 Q. Okay. And going on the recordkeeping, are you saying
09:59:42 that members have said that they need to maintain records
09:59:45 to defend against litigation?
09:59:47 A. Absolutely. Yes.
09:59:48 Q. Can you describe in detail a specific member who has
09:59:53 raised this concern with you?
09:59:54 A. I think that's the number-one concern raised by all
09:59:58 the members.
09:59:58 Q. Can you identify a specific one?
10:00:00 A. I could identify specific ones if I could look at my
10:00:05 e-mails and my notes.
10:00:06 Q. But you can't do so today?
10:00:08 A. No. I could probably talk about, you know, a couple,
10:00:13 the ones that I have talked to at length recently. Like,
10:00:17 you know, Lettuce Entertain You will tell you that as a
10:00:24 general counsel that yeah, recordkeeping is impossible to
10:00:26 be able to keep track of these kinds of shift from one
10:00:31 category to the next.
10:00:33 Q. Can you describe in detail how the recordkeeping
10:00:37 requirements under the final rule would be different from
10:00:41 recordkeeping requirements prior to the final rule?

10:00:44 A. Yes. If you're looking at a server and you're looking at all of the tasks that they do versus, for example, the example that the Department of Labor said, mowing the lawn, that is very easy to keep records of that. You know, one is one job and you're doing your job and the other one is another. When the recordkeeping would have to include slow times at the restaurant, when you haven't even changed an occupation, you're still doing your duties as a server, that is almost impossible to track.

So they are still trying to figure out if you create a new category, they're still talking to IT to try to figure out if there's a way that you can punch in, punch out. So it's completely different. Again, you have three different categories that didn't exist before, and now you have, in addition to the 80/20, you have the 30 minutes that you have to account for, as well.

Q. You mentioned 80/20, restaurants have been subjected to quantitative temporal limits on the amount of related non-tipped duties that servers could perform since the 1980s; isn't that correct?

A. We would disagree with that statement.

Q. Well, in 1988, the Department of Labor issued a opinion letter that said that there was a 20 percent tolerance for related non-tipped duties; isn't that

10:01:57 correct?
10:01:58 A. I cannot -- if you say so. I'll take your word for
10:02:01 it.
10:02:01 Q. There have been several private lawsuits brought
10:02:04 against restaurants in which courts have subjected
10:02:09 restaurants to the 80/20 rule; isn't that correct?
10:02:12 A. Not all of them. But yeah, we disagree. Again, we
10:02:15 want to point out, that wasn't a regulation and it doesn't
10:02:19 have the force of law.
10:02:19 Q. It was applied in several private lawsuits between
10:02:21 the 1980s and today; isn't that correct?
10:02:23 A. It has been rejected by other courts, as well.
10:02:28 Q. I don't think any of those courts is cited in the
10:02:31 briefing papers in this case, is it?
10:02:33 A. I didn't know I was testifying on the merits. I will
10:02:35 have to go look at the issue. I think, you know, I'm
10:02:38 testifying as to the irreparable harm, so I don't want to
10:02:41 get into 80/20 and the opinion letters and how we feel
10:02:45 about it.
10:02:45 Q. I'll discuss that briefly. You're appearing today as
10:02:48 a witness on behalf of the plaintiffs on the issue of
10:02:50 irreparable harm, correct?
10:02:51 A. Correct.
10:02:52 Q. And you're also counsel of record in this case,
10:02:54 correct?

10:02:54 A. That is correct.
10:02:55 Q. And have you performed any work as counsel of record
10:02:58 in preparing the briefing papers on plaintiffs' motion for
10:03:01 preliminary injunction?
10:03:02 A. I have reviewed the documents. That's correct.
10:03:05 Q. So the answer to my question is yes, you have
10:03:07 prepared for --
10:03:09 A. I would say yes. Yes.
10:03:10 Q. No further questions.
10:03:11 THE COURT: Any followup?
10:03:12 MR. DECAMP: No redirect, your Honor.
10:03:13 THE COURT: Okay. Thank you. You may step down.
10:03:15 THE WITNESS: Thank you.
10:03:24 MR. DECAMP: Pulling up the next exhibit that we
10:03:26 have, which is -- get the number for you here. It is P-5
10:03:32 for purposes of this exhibit. It is the declaration of
10:03:36 Tracy Vaught. The original one filed, not the
10:03:38 supplemental that has been excluded from the record today,
10:03:42 it appears in the record at EFC 12-1, starting at page 73
10:03:47 of the record on that motion. And we'd just like to point
10:03:52 out a few items here.
10:03:53 In this declaration, we have the owner-president
10:03:57 of a restaurant group here in Texas and she operates five
10:04:03 restaurants. And what she talks about in the declaration
10:04:07 is the harm and the challenge that this regulation

10:04:10 presents. Of note here, it's important to understand that
10:04:14 when we're talking about servers, we're talking about
10:04:17 people subject to the tip credit, in many restaurants,
10:04:20 including here in paragraph 4, the front of the house
10:04:25 employees who receive tips, when you include the tips and
10:04:28 their cash wages, they're often among the best paid and,
10:04:31 in fact, in this instance, the highest paid employees in
10:04:34 the restaurant.
10:04:35 Not necessarily highest in terms of direct cash
10:04:38 wages from the employer but in terms of total earnings.
10:04:41 These are not, in most instances, individuals who are --
10:04:45 they're oftentimes depicted as they're making $2.13 an
10:04:49 hour or they're making some other wage that is below
10:04:51 minimum wage. But when one factors in the tips that
10:04:53 they're earning, in this industry, it tends to be feast or
10:04:57 famine. There are slow periods, there are busy periods,
10:05:01 and in the busy periods, an employee can in the course of
10:05:04 an hour or two make all the tips for the day; and the rest
10:05:06 of that time is typically spent preparing, you know,
10:05:10 cleaning up after a meal and getting ready for the next
10:05:12 service.
10:05:12 So it's important to understand how the flow
10:05:14 works and, also, the economic circumstances of these
10:05:17 employees. This employee talks about the harm here.
10:05:21 Talks about no longer being able to take a tip credit as a

10:05:25 result of the risk that this rule poses. And so, it's --
10:05:31 they talk about the expense here. If they stop taking the
10:05:33 tip credit, they're going to spend -- and she says this in
10:05:36 paragraph 5 -- close to a million dollars extra per year
10:05:39 on labor. That's an immediate harm that is not
10:05:42 recoverable if this regulation ultimately is invalidated.
10:05:47 They can't get the money back.
10:05:48 Talk about the ongoing compliance costs and I'll
10:05:51 come to that in a later exhibit. So what this declaration
10:05:56 is talking about here is the challenges just on the ground
10:06:01 level of what it means to run a restaurant when you've got
10:06:06 your workforce that's dealing with COVID. You're dealing
10:06:09 with all the other challenges that the industry is facing
10:06:11 now; and now, on top of that, we add a regulation that
10:06:14 forces the company to change how they staff their work,
10:06:18 and that imposes significant operational costs and what
10:06:22 the business is supposed to do about that.
10:06:24 Talk about the food prices that's skyrocketing in
10:06:27 paragraph 8, what the job market is like, what has
10:06:29 happened to wages and, also, the competition that
10:06:32 restaurants today face vis-a-vis grocery stores because
10:06:36 people don't have to eat out. So I'm referring to what
10:06:38 she says in paragraph 8, which is up on the screen.
10:06:42 So what's happening with these restaurants -- and
10:06:45 she details this in the paragraph -- is they're getting

10:06:47 squeezed because their profits are getting cut because
10:06:50 they have to deal with either increased compliance costs
10:06:53 or increased wage costs, or both, and yet, to try to make
10:06:56 that money up by raising menu prices is typically not an
10:07:00 option because if they do that, then customers will
10:07:02 frequently go elsewhere. She describes that.
10:07:04 THE COURT: And how many restaurants does she?
10:07:06 MR. DECAMP: Five.
10:07:07 THE COURT: So you're telling me that her
10:07:09 increased costs in five restaurants would be a million
10:07:12 dollars a year?
10:07:13 MR. DECAMP: That's what she testifies to in this
10:07:15 paragraph, yes, your Honor -- or in this declaration --
10:07:16 THE COURT: Couldn't you hire five people to be
10:07:19 present with a pad, keeping track of what people are doing
10:07:23 all day, for a million dollars a year in five restaurants?
10:07:26 MR. DECAMP: It's not clear. I mean, she's
10:07:28 basing that million on if she stops taking the tip credit.
10:07:31 THE COURT: Well, but she doesn't have to stop
10:07:33 taking the -- she can spend a million dollars over five
10:07:38 restaurants complying with this regulation, which, by the
10:07:42 way, presumably, she was following the 80/20 guidance all
10:07:47 along.
10:07:48 MR. DECAMP: Again, it comes down to the
10:07:49 difference between --

10:07:50 THE COURT: That's just not credible.

10:07:52 MR. DECAMP: It comes down to the difference, your Honor, between complying, in fact, and being able to prove compliance in a way that keeps you out of litigation.

10:08:00 THE COURT: Yeah, well, plaintiffs are going to have to prove noncompliance. So you're imaging a world where plaintiffs have the ability to prove noncompliance, but restaurants don't have the ability to prove compliance.

10:08:11 MR. DECAMP: Your Honor, it's -- that ignores the reality of wage-and-hour litigation.

10:08:16 THE COURT: Oh, trust me, I have -- I'd say, more than any kind of case that I've tried is FLSA case. So -- FLSA cases. So I understand that. I understand the economics of it, too. I understand that people don't sue restaurants if they don't think they can recover anything from, also, right?

10:08:36 MR. DECAMP: They often do, your Honor. We see demand letters. We see complaints filed where the plaintiff's lawyer understands that this company can't afford to go the distance in the case, and so, it's going to exhort a settlement because the alternative that the company faces is bankruptcy. So we see that every day.

10:08:51 And when we're talking about what the burdens are

10:08:53 in litigation, your Honor's technically correct in terms
10:08:57 of the burden of proof. Of course, it remains the
10:08:59 plaintiffs' burden to prove noncompliance. But the
10:09:02 practical reality is that given the ease with which courts
10:09:04 certify conditionally collective actions, again, setting
10:09:07 aside the Swales decision in the Fifth Circuit, everywhere
10:09:09 else in the country that practice it nationwide, those
10:09:12 cases routinely get certified with one declaration, two
10:09:15 declarations, three declarations, and the employer doesn't
10:09:17 get the chance.
10:09:18 They'll oftentimes introduce plenty of
10:09:20 declarations saying, well, no, that didn't happen to me.
10:09:23 I spent only 10 percent of my time on side work. And the
10:09:26 courts typically say that's a merits issue. We don't deal
10:09:29 with that at the first stage of the case. We'll deal with
10:09:31 that on decertification. You can make these arguments
10:09:33 later in the case. By the time that happens, notice has
10:09:36 gone out, people have joined the case, discovery has
10:09:38 commenced, and a business that's already on the edge in
10:09:40 terms of remaining solvent is now having to pay its
10:09:44 lawyers six figures just to stay in the fight in the
10:09:47 litigation.
10:09:47 It's an impossible burden. So the insidious part
10:09:53 about this regulation, separate and apart of being
10:09:56 unlawful and disconnected from the FLSA, is that it forces

10:09:59 employers into this Hobson's choice of incurring either
10:10:02 heightened labor costs by changing how they staff their
10:10:05 restaurants, hiring five employees to stand there with
10:10:08 pads and monitor people's time, that's an unrecoverable
10:10:11 cost. Or doing away with the tip credit or changing how
10:10:15 you otherwise structure your operations, doing that or
10:10:20 maintaining records of all this time, which nobody yet
10:10:23 knows how to do, the timekeeping systems don't do it, or
10:10:27 running the risk and saying, I hope I don't get sued.
10:10:30 Understanding that if you do get sued, even if you could
10:10:33 win at the end, you can't make it to the end because
10:10:35 you're not going to have the resources to be able to fight
10:10:37 that litigation. So it's an unwinnable situation and
10:10:40 that's the burden that it puts employers to.
10:10:44 THE COURT: Problem is that the only example
10:10:46 you've given me in this hearing is a totally non-credible
10:10:50 example of the burden that a restaurant would have to
10:10:54 endure unless you convince me otherwise with five
10:10:55 restaurants and it's worth not taking the credit, because
10:11:02 she says it would cost $5 million to comply over five -- a
10:11:06 million dollars over five restaurants, that's -- you're
10:11:11 doing what you're accusing plaintiffs' lawyers of doing,
10:11:15 and that is throwing out some kind of, you know,
10:11:18 allegation that they're going to have to now litigate all
10:11:20 the way -- you want me to enjoin a rule based on something

10:11:25 that is totally pulled out of the air.

10:11:28 MR. DECAMP: Your Honor, the million-dollar
10:11:29 figure was not pulled out of the air, respectfully. It
10:11:32 was pulled out of the concept of if they don't take the
10:11:34 tip credit, if they forego the tip credit and pay
10:11:37 everybody in the restaurant at least full minimum wage,
10:11:39 the delta between the cash which they're paying now and
10:11:41 the full minimum wage would be that million dollars.

10:11:43 THE COURT: But it would be their choice to not
10:11:45 take the credit, and only the economic reason they would
10:11:49 do that is that they believed that it would cost something
10:11:52 like a million dollars to comply.

10:11:55 MR. DECAMP: And -- but the reality is, if they
10:11:58 were to take a different approach, if they were to hire
10:12:01 the five employees to stand there and keep the records,
10:12:04 even that, if we're talking about five employees or more
10:12:08 than five employees -- because it would have to be for all
10:12:10 the hours at the restaurant is open and even preopening
10:12:13 and post closing if we're tracking, you know, opening side
10:12:17 work, closing side work, if we're talking about, you know,
10:12:19 hiring five new employees or more to cover these different
10:12:24 sites, seven days a week, we're still talking well into
10:12:27 six figures in the course of --

10:12:28 THE COURT: We could make it a law school
10:12:30 question and have those five employees also serving food.

10:12:35 MR. DECAMP: If they're serving food, they're just keeping records --

10:12:37 THE COURT: I'm just kidding.

10:12:38 MR. DECAMP: And I appreciate what your Honor's saying. I understand that there might be alternatives to foregoing the tip credit.

10:12:43 THE COURT: But I'm also acknowledging their complexity of compliance here. I don't doubt that. And I take the point that, you know, especially in an environment where you pivot from tipping to non-tipping roles, I get the burden of compliance. I just -- the actual evidence in front of me specifically about what the burden would be in a particular -- other than these generalities of, you know -- maybe I can understand by your description that people would have this burden without specific, you know, examples, but this is -- that's not a good one.

10:13:24 MR. DECAMP: All right. Well, even if your Honor doesn't like that particular example, doesn't find that particular example credible because there might be alternatives that are less expensive than foregoing the tip credit entirely. I understand your Honor's point there. If we still accept that under your Honor's -- I won't call it proposal, but the hypothetical that your Honor offered of hiring employees to track the time

10:13:44 instead of doing away with the tip credit, we still would
10:13:47 at least need to recognize that the cost of hiring what
10:13:49 may be five or may be ten employees to be in these five
10:13:53 restaurants every hour that there are employees -- tipped
10:13:57 employees in the restaurants to track that time is a
10:13:59 burden that would under any kind of normal wage scenario
10:14:03 be into the six figures over the course of a year.
10:14:06 And I've gone to the next exhibit, if I may,
10:14:08 which is the Department of Labor's final rule. These are
10:14:12 excerpts from this and we have presented this as
10:14:16 Plaintiffs' Exhibit 8 for this hearing. And I think that
10:14:18 when we're talking about the costs, the important thing to
10:14:20 understand is that we're not making up numbers that the
10:14:23 department disagrees with.
10:14:25 If we look at paragraph 5 here, the cost summary,
10:14:28 the department itself acknowledges that in addition to the
10:14:31 first year costs that the industry will have to incur
10:14:35 dealing with this rule of over $224 million nationwide,
10:14:40 there will be ongoing management costs of $177 million a
10:14:45 year. That's the department's estimate. We don't agree
10:14:47 with that number. We think the number's low. But even
10:14:49 the department is saying that this is a rule that's going
10:14:52 to cost this industry close to $200 million a year just to
10:14:54 comply with.
10:14:55 THE COURT: But I mean, all regulation -- FLSA is

10:15:00 probably very expensive to comply with in almost every
10:15:05 respect, but that's just the nature of regulation, isn't
10:15:07 it?
10:15:08 MR. DECAMP: Sure, but it's also irreparable harm
10:15:10 if this regulation is struck. So again, goes to -- then
10:15:14 it's back to the likelihood of success on the merits.
10:15:16 This is an unrecoverable cost once the businesses have
10:15:19 unvested in this and have dealt with it. If they've
10:15:22 changed their policies, if they've changed their wage
10:15:25 practices, that money is gone. They don't get it back.
10:15:27 THE COURT: Right.
10:15:29 MR. DECAMP: And so, I think that goes into the
10:15:31 hopper. The reality is that to the extent the regulation
10:15:34 ultimately is upheld, any of the employees that are at
10:15:36 issue here will have their rights under the FLSA and under
10:15:39 the regulation to pursue private action. The Department
10:15:42 of Labor could pursue private action. So it's not --
10:15:45 they're not left without a remedy. We're trying to keep
10:15:47 these restaurants alive while this issue works its way
10:15:49 through the court. Respectfully, that's what's at stake.
10:15:55 THE COURT: Sure. I get it.
10:15:55 MR. DECAMP: We would submit that in light of the
10:15:58 arguments we've presented on the invalidity of the
10:16:01 regulation and with regard to the harm that this industry
10:16:06 would face, that the plaintiffs would face, and the lack

of harm to the defendants, that a preliminary injunction is appropriate in this instance, your Honor.

THE COURT: Let me ask you this. Has this -- has a challenge to this new rule been successful in any court?

MR. DECAMP: There hasn't been a challenge to this rule in any court. Your Honor, there have been litigations, and I would say the three decisions that are cited most commonly to deal with this, and they appear in the government's brief, are the Fast against Applebee's decision from the Eighth Circuit, the Marsh against J. Alexander's decision from the Ninth Circuit en banc, and then, the Rafferty against Denny's decision from the Eleventh Circuit, very important things to understand about those decisions.

In the Fast case, the parties stipulated that the regulation at issue -- and that was the former version of the dual jobs regulation. They stipulated that regulation was entitled to Chevron deference. That wasn't at issue; that wasn't a Chevron case. Fast was a question of whether the department's sub-regulatory guidance, the 1988 version of -- and with respect to counsel, it wasn't an opinion letter. It was the field operations handbook.

The sub-regulatory guidance that the department issued first articulating this 20 percent limitation on at the time, unregulated tasks. The question was whether

10:17:24 that would get Auer deference or Skidmore deference.
10:17:26 That's what was at issue in Fast. Chevron was not on the
10:17:29 table because the defendant didn't argue it. So the Court
10:17:31 focused all of its attention on Auer versus Skidmore and
10:17:36 decided on Auer deference. The problem is, if you accept
10:17:39 the premise of the 1967 regulation, the dual jobs
10:17:43 regulation, it's already gone too far because it's already
10:17:46 strayed from the statutory purpose.
10:17:47 So that's one piece of it. When we look at Marsh
10:17:53 against J. Alexander's, that's a very interesting decision
10:17:56 because there, the only reason that the Court articulated
10:17:59 for applying Chevron deference was because the Ninth
10:18:03 Circuit precedent that deemed a challenge to the adoption
10:18:06 of the dual jobs regulation untimely under the
10:18:09 Administrative Procedure Act. Under Ninth Circuit case
10:18:12 law, the Court said you cannot challenge a notice and
10:18:16 comment rule more than six years after it's been put on
10:18:20 the books.
10:18:21 That's a separate question from whether one can
10:18:23 argue that the regulation is entitled to less than full
10:18:25 Chevron deference, but the Court didn't see it that way.
10:18:28 That is a Ninth Circuit quirk of the law. The court does
10:18:31 not conduct a Chevron analysis in that case other than
10:18:34 saying it would not consider the challenge because it
10:18:37 deemed it untimely under Ninth Circuit precedent. Judge

10:18:41 Paez's decision, while it said that the verbiage that
10:18:44 we've talked about at the outset of the hearing, the
10:18:46 occupation and engaged in an occupation were ambiguous,
10:18:50 the court didn't then connect and ask the followup
10:18:54 question of, well, did the department try to define those
10:18:57 terms? It went straight to, well, there's a dual jobs
10:19:01 regulation on the book, there's a field operations
10:19:03 handbook, things are ambiguous, seems reasonable to us,
10:19:06 let's go forward with it.
10:19:07 The partial dissent and the dissent in that case,
10:19:11 Judge Graber's dissent does an excellent job of pointing
10:19:14 out why -- and Judge Graber's was the partial dissent.
10:19:17 Her partial dissent does an excellent job of showing why
10:19:21 the dual jobs regulation, the 1967 version doesn't support
10:19:25 what the Court was doing with regard to this 20 percent
10:19:28 limitation. She points out that what the 1967 dual jobs
10:19:31 regulation really did was, it said okay, if employees are
10:19:36 truly involved in two different occupations, in that
10:19:38 instance, the hotel maintenance man who also happens to
10:19:41 work in the restaurant in a tipped capacity, the
10:19:44 department took the position -- and it's questionable
10:19:46 whether this is lawful under the FLSA. It's inconsistent
10:19:49 with some of the legislative history. But the department
10:19:51 took the position in that 1967 regulation that an employer
10:19:54 could take a tip credit for the time spent in the

10:19:56 restaurant occupation but not for time spent as a
10:19:59 maintenance person. And understandable.
10:20:02 The regulation went on to state that that is
10:20:05 different from a circumstance where a waitress in a
10:20:10 restaurant spends part of her time making coffee or doing
10:20:14 other side work. And there was another example that was
10:20:16 provided, as well. What Judge Graber points out is the
10:20:21 flaw in the way that the courts have looked at that. And
10:20:24 that includes the Ninth Circuit. It includes Fast, as
10:20:26 well, at that time. And I think now, we could say it also
10:20:28 applies to Rafferty in the Eleventh Circuit.
10:20:31 Is the court jumped to the conclusion that
10:20:33 because the dual jobs regulation at the time had the
10:20:36 concept of, well, an employee who spends some of her time
10:20:39 doing these other tasks is not in a dual job situation?
10:20:44 The Court conflated that with -- and anything that is more
10:20:47 than some of her time on those tasks is necessarily
10:20:51 dual-job scenario when that's not what the text of the
10:20:53 regulation said. The regulation didn't purport to say
10:20:55 that the only time you don't have a dual job scenario is
10:20:59 when the time spent on this what amounts to side work,
10:21:02 what we're calling, is less than, quote, some time, less
10:21:06 than this amount, the regulation didn't purport to define
10:21:08 the outer bounds of what that was.
10:21:10 The Ninth Circuit Judge Paez's decision, the

10:21:13 majority ruling in the en banc decision in Marsh went
10:21:16 straight to the conclusion that anything that is not
10:21:18 within that counterexample that was provided is
10:21:22 necessarily a dual job scenario. That's not what the
10:21:25 regulation said. And Judge Graber really points that out
10:21:28 that the examples that were provided of a person in a
10:21:30 single occupation doing other tasks that don't amount to a
10:21:35 dual job situation were simply set up as Swales to
10:21:38 distinguish from the true dual jobs situation. They
10:21:42 weren't meant to define in any way as far as an employer
10:21:46 could go without crossing the line.
10:21:47 And that's why in Judge Graber's opinion -- and
10:21:51 it's not as though she, you know, bought in entirely to
10:21:54 what the defendants were saying. She agreed with the
10:21:56 plaintiffs on part of the claim on the issue of unrelated
10:21:59 duties, what now would be considered duties that don't
10:22:03 relate to the occupation. It is roughly analogous to, but
10:22:08 not equivalent to, the third category of time that we see
10:22:09 under the current final rule. She agreed with the
10:22:12 plaintiffs that the department could regulate that time
10:22:16 and say that an employer could not -- to bring it to this
10:22:19 example in the scenario where the employee spends a day
10:22:23 out mowing the lawn, she would say no, you can't take a
10:22:27 tip credit for that time. That has nothing to do with
10:22:28 being a server. But on this 20 percent thing, that

10:22:33 standard that was in the old 80/20 rule and that now
10:22:36 emerges in a different way in the final rule here, she
10:22:39 said that's just -- that doesn't flow from the dual jobs
10:22:42 regulation.
10:22:43 And we see the same flaw in Fast. It was the
10:22:46 same issue of the courts jumped straight from the
10:22:50 department talks about some time or occasionally in the
10:22:54 regulation to okay, now we get to impose a temporal limit
10:22:57 and we get to define it and we use 20 percent in other
10:22:59 contexts that have nothing to do with this, but 20
10:23:02 percent's a good benchmark, and so, let's go straight to
10:23:04 that. But that's not what the dual jobs regulation
10:23:08 originally said.
10:23:09 And then, when we come to Rafferty's, there's
10:23:11 also not a Chevron analysis there. Rafferty is also
10:23:16 primarily an issue of whether the department's 2018
10:23:20 backtracking on the whole issue of dual jobs -- and as the
10:23:23 Court may or may not know, the Restaurant Law Center sued
10:23:27 the Department of Labor about that time in this court, and
10:23:30 the department agreed as a result of that litigation to
10:23:33 withdraw the dual jobs regulation. There was a
10:23:38 settlement. We agreed. The case went away and the
10:23:41 department as part of that -- resolving that case withdrew
10:23:44 its dual jobs regulation -- its dual jobs sub-regulatory
10:23:49 guidance and abandoned the whole 20 percent concept.

10:23:52 The question before the Court in Rafferty's -- or
10:23:56 in Rafferty against Denny's, I'm sorry, in the Eleventh
10:23:59 Circuit was whether the department -- whether the action
10:24:02 the department took in 2018 rescinding the 20 percent
10:24:07 rule, the old 20 percent would be entitled to deference
10:24:10 under either Auer or Skidmore, and the court rejected,
10:24:15 declined to give deference to what the department did in
10:24:17 2018.
10:24:18 But again, the policy considerations, the reasons
10:24:21 that the Court articulated for rejecting that were very
10:24:26 much questionable, including, among other things, buying
10:24:28 into the argument that the department makes now and cites
10:24:30 that language from Rafferty's, I believe in the briefing,
10:24:33 certainly in the final rule, for the proposition that
10:24:37 tipped employees should be pretty much continuously
10:24:39 earning tips, and that it's a problem if a tipped employee
10:24:43 has really any meaningful increment of time where they're
10:24:46 not able to earn tips.
10:24:47 And that comes back to the point I made at the
10:24:49 outset, which is that's not what the FLSA says. The FLSA,
10:24:52 which allows an employee to earn just $7.50 a week on
10:24:56 average in tips qualifies for being a tipped employee. If
10:25:02 all you need is $7.50 a week in tips to be a tipped
10:25:07 employee, then there's a whole lot of time that Congress
10:25:09 understood and restaurant operators would tell you that a

10:25:12 tipped employee could be spending on activities that don't
10:25:14 generate tips and yet, still qualify the employee for
10:25:18 being a tipped employee. So Rafferty's, I think, goes
10:25:22 down the same rabbit hole the department's going down now,
10:25:25 which is focusing myopically on tips and not on
10:25:29 occupations, not on the language of the statute and what
10:25:32 Congress said in Section 3(t) as well as Section 3(m) of
10:25:36 the FLSA.
10:25:36 So the department's correct that there are three
10:25:41 cases that at least have supported the old version, the
10:25:46 old 80/20 rule. We have not seen any cases that have
10:25:49 ruled on this rule, which is different from 80/20. In
10:25:53 some ways, there are similarities. But none of those
10:26:02 courts really grappled with the core issue here, which is,
10:26:06 did the department in regulating -- or in dealing with the
10:26:11 asserted ambiguity in the statute, did they regulate in a
10:26:15 way that addressed that ambiguity, or did they go off in a
10:26:17 different direction? The argument I made at the outset of
10:26:20 today's hearing.
10:26:20 So we would argue that neither Fast nor Marsh nor
10:26:25 Rafferty's really lends the government much support here.
10:26:31 And I don't think, frankly, that the Fifth Circuit would
10:26:32 give those decisions much weight either in terms of how
10:26:34 the court approaches looking at agency authority and
10:26:38 holding agencies to acting within the authority that the

10:26:43 statute confers. And within that authority, great, but
10:26:46 you exceed, it's going to be struck. And that's what the
10:26:49 department did here, respectfully, your Honor.
10:26:50 THE COURT: Thank you very much. That's very
10:26:52 helpful.
10:26:53 Mr. Walker.
10:26:54 MR. WALKER: Thank you, your Honor.
10:27:00 The restaurant industry in this case is asking
10:27:03 the Court to adopt an interpretation of the Fair Labor
10:27:06 Standards Act that would undo nearly four decades of
10:27:10 important worker protections for tipped employees. Since
10:27:13 1979, the Department of Labor has prohibited employers
10:27:17 from taking a tip credit for work that is not part of a
10:27:20 tipped employee's tipped occupation. And since the 1980s,
10:27:24 the Department of Labor and numerous courts have placed
10:27:27 quantitative temporal limits on the amount of non-tipped
10:27:31 but related duties that tipped employees may perform
10:27:34 before their employers have to start paying them a full
10:27:38 minimum cash wage.
10:27:39 Plaintiffs would have this court interpret the
10:27:42 statute in a way that would render these long-standing and
10:27:45 crucial protections suddenly unlawful, and they are not
10:27:50 bashful about that. And opposing counsel, my friend's
10:27:52 presentation, he goes all the way back and criticizes the
10:27:55 Department of Labor's regulations, dating as far as back

10:27:57 as 1979 and 1988. But the statute does not compel their
10:28:03 reading.
10:28:03 And though this is a very hotly litigated area
10:28:07 between private employers and employees, they are unable
10:28:10 to identify even a single case that adopts their reading
10:28:14 of the statute. Indeed, as our brief shows and to the
10:28:18 contrary in case after case, these quantitative temporal
10:28:22 limits that the Department of Labor has placed on
10:28:24 non-tipped-related duties have been upheld by courts: and
10:28:28 that's in Fast and Marsh and Rafferty, in particular, but
10:28:31 also numerous district courts.
10:28:33 Now, plaintiff tries to distinguish Marsh
10:28:36 Rafferty and Fast because they do, in fact, largely
10:28:40 concern an interpretation of the regulation, but in each
10:28:43 of those cases, they do directly confront the statute.
10:28:48 Indeed, the plaintiffs in Fast made arguments very similar
10:28:51 to the plaintiffs here that the word "occupation" in the
10:28:54 statute implies some kind of broad analysis of the mere
10:28:58 label that attaches to a tipped employee, rather than the
10:29:03 actual duties that that employee is performing. And the
10:29:05 Fast court rejected that.
10:29:06 And we've distinguished in footnote 4, on page
10:29:08 28, we specifically quote language from each of those
10:29:10 three cases that shows that they are all dealing
10:29:12 specifically with the statute, and they find that

10:29:15 quantitative temporal limits that the Department of Labor
10:29:17 has imposed to be appropriate under the statute.
10:29:20 And that makes good sense under the statute. I
10:29:24 mean, there can really be no dispute that at Chevron step
10:29:28 zero, the Department of Labor has the authority here to
10:29:30 promulgate regulations in this area. The 1966 amendments
10:29:34 that added the tipped provisions to the Fair Labor
10:29:38 Standards Act say that explicitly. They provide the
10:29:40 Department of Labor the authority to promulgate
10:29:43 regulations in this area.
10:29:44 So the question then is whether or not those
10:29:46 regulations are consistent with the language of the
10:29:49 statute. And the key language of the statute here is
10:29:52 "engaged in an occupation." A tipped employee is defined
10:29:56 as a tipped employee when they are engaged in an
10:29:59 occupation in which the employee receives the threshold
10:30:01 amount of tips.
10:30:02 And what the statute does not say is how the
10:30:05 Department of Labor is to ascertain when an employee is
10:30:09 engaged in such an occupation. And so, relying on its
10:30:12 explicit authority under the tip provision amendments, the
10:30:16 Department of Labor in a sort of classic case promulgates
10:30:20 regulations that permit it to effectuate the provisions of
10:30:25 this statute. And the Department of Labor has done so
10:30:27 reasonably here by taking a duties-based inquiry, looking

10:30:32 at the actual duties that a tipped employee is performing
10:30:36 to determine whether or not they are engaged in a tipped
10:30:39 occupation. And that makes perfect sense.
10:30:41 And I think even plaintiffs and much of their
10:30:43 argument acknowledge that there has to be some examination
10:30:46 of the duties that a tipped employee is performing to
10:30:49 determine whether or not they are engaged in a tipped
10:30:51 occupation. They mentioned that, of course, an employee
10:30:55 who's mowing the lawn would never be determined to be
10:30:57 engaged in a tipped occupation, but that requires the
10:31:00 Department of Labor to do exactly what it's doing here:
10:31:03 To look at the duties that are being to perform,
10:31:06 categorize the duties that are being to perform, to
10:31:09 determine whether or not an employee performing those
10:31:11 duties is engaged in a tipped occupation.
10:31:13 Plaintiffs touting of the O*NET listing of duties
10:31:16 is much the same -- establishes, I think, much the same
10:31:18 concession. There has to be some examination of the
10:31:20 duties that a tipped employee is performing in order for
10:31:23 the Department of Labor to effectuate this provision of
10:31:26 the statute and determine whether or not they are engaged
10:31:28 in the tipped occupation.
10:31:29 So the question, then, is whether or not the test
10:31:31 that the Department of Labor has employed in order to do
10:31:34 that is one that is rational. And that's the standard of

10:31:38 State Farm. It's not a high one. It's whether or not the
10:31:40 agency has articulated a rational explanation for the test
10:31:44 that is imposed. And it's important here to look at the
10:31:47 context of the test the Department of Labor is using.
10:31:50 It's not inventing the set of whole cloth. What it's
10:31:53 determining to do, the full context sort of this
10:31:56 rulemaking is, it's looking at the rulemaking that was
10:31:58 finalized in 2020, but never went into effect, and making
10:32:02 changes to that.
10:32:02 So the Department of Labor found that the
10:32:05 rulemaking that went into effect in 2020 which rescinded
10:32:09 that 80/20 test that had been imposed up to that day -- or
10:32:13 prior to the 2018-2019 withdrawal of the guidance.
10:32:18 THE COURT: Can you tell me what guidance in that
10:32:22 context means? What -- you know, it was in a, you know,
10:32:28 book or a -- you know, what does guidance mean within the
10:32:31 context of the Department of Labor practice?
10:32:34 MR. WALKER: Sure, your Honor. So a lot of this
10:32:36 guidance is based on the dual jobs rule that was issued in
10:32:40 1967. And so, in many years following that, restaurants
10:32:45 would write to the Department of Labor, the Wage and Hour
10:32:47 Division for guidance on how to apply that provision. So
10:32:51 we have the opinion letters that were issued in that
10:32:53 context in 1979, 1985 and 1986, I believe. 1980 and 1985.
10:33:05 And those are responding to specific inquiries from

10:33:07 restaurants as to how we apply this dual jobs regulation.

10:33:09 And then, in 1988, the Department of Labor

10:33:15 updated a handbook which sort of established the specific

10:33:19 20 percent threshold.

10:33:20 THE COURT: What's the legal effect of guidance

10:33:22 in a handbook?

10:33:24 MR. WALKER: I'm sorry?

10:33:24 THE COURT: What's the legal effect of guidance

10:33:26 or a statement in a handbook?

10:33:28 MR. WALKER: Well, that's been the subject of

10:33:30 much litigation leading up to this final rule. Courts

10:33:34 have continuously upheld that as an appropriate

10:33:37 interpretation of the dual jobs regulation as it was

10:33:43 promulgated in 1967.

10:33:45 THE COURT: Is there a principle in

10:33:47 administrative law in which if a statute has been applied

10:33:53 by an agency in a particular way for an extended period of

10:33:58 time, that congressional failure to clarify is in some

10:34:03 sense -- it ratifies in some sense the agency's

10:34:11 application of the statute, if you understand what I'm

10:34:13 saying.

10:34:13 MR. WALKER: Yes, I think so, your Honor. I

10:34:15 think certainly that is a typical inquiry that courts look

10:34:17 at. I don't have a citation for you up the top of my

10:34:20 head. But certainly whether or not a regulatory approach

10:34:23 is longstanding is certainly something that courts look at
10:34:26 when deciding whether or not a particular regulatory
10:34:29 approach is contrary to that statute.
10:34:30 THE COURT: Because presumably, Congress -- if
10:34:33 Congress thought that it was a gross misapplication of
10:34:38 congressional intent, they would have the ability over a
10:34:42 period of 30 years to clarify that in the statute, right?
10:34:47 MR. WALKER: That's precisely right, your Honor.
10:34:49 In the tip -- and the Fair Labor Standards Act has been
10:34:53 amended numerous times since the department took this
10:34:55 approach. It was amended as recently -- the specific tip
10:34:59 provisions were amended as recently as, I believe, 2011, I
10:35:05 believe. But it was in the past 2010. These are
10:35:08 provisions that are looked at by Congress continuously,
10:35:10 amended continuously. And so, certainly if Congress
10:35:14 disagreed with the Department of Labor's approach here, it
10:35:17 has had ample opportunity in one of these amendments to
10:35:20 change them.
10:35:21 But so going back to the context for this rule,
10:35:23 what they were doing was looking at the 2020 rule. And
10:35:25 what the 2020 rule did was specifically jettison any kind
10:35:28 of temporal limitation on non-tipped but related duties
10:35:32 and replaced that with the test that said we're going to
10:35:34 look at whether or not the duties are performed
10:35:38 contemporaneously with or within a reasonable time of

10:35:41 tipped duties.

10:35:42 And so, what the Department of Labor was doing in
10:35:45 this final rule was saying that test we don't think is
10:35:47 sufficiently clear. That test has all the problems that
10:35:50 the restaurant industry say this test has. It's unclear,
10:35:53 it's difficult to apply. And so, what the Department of
10:35:56 Labor did was come up with a -- it doesn't sufficiently
10:35:59 protect workers because it allows restaurants to assign a
10:36:02 tipped employee and this is what happens. A tipped
10:36:05 employee makes 2.13 an hour and the whole theory of these
10:36:10 provisions is that they are earning tips to boost that up
10:36:14 to at least the minimum wage.

10:36:16 So what they -- when restaurants assign them to
10:36:19 clean the bathroom, vacuum the floors after the restaurant
10:36:22 is closed, you know, polish silverware before the
10:36:28 restaurant opens, they are paying them 2.13 an hour to
10:36:32 perform that work, and the employee has no opportunity to
10:36:34 earn tips during that time. What the restaurant is
10:36:36 effectively doing is taking the tips that the employee's
10:36:40 going to earn an hour later, during their actual tipped
10:36:43 employment, and subsidizing a dramatically reduced wage to
10:36:48 that employee during those non-tipped hours.

10:36:50 And this 2.13 is a dramatically reduced wage from
10:36:54 the federal minimum wage of 7.25 an hour. And that 2.13
10:36:58 has actually been locked in place since 1991. Even as the

10:37:02 federal minimum wage continues to rise in the ensuing
10:37:04 years, that 2.13 has been locked in place since that time.
10:37:09 So it is a dramatically reduced wage.
10:37:11 And what the Department of Labor found was that
10:37:13 test was difficult to apply and didn't appropriately
10:37:17 protect workers. So what they came up with was a
10:37:19 functional test, a functional approach, which looks at --
10:37:23 as plaintiffs described it, they categorized different --
10:37:27 they have different categories of tasks that are easily
10:37:30 defined and which new duties can easily be inserted into
10:37:35 that sort of framework. And the department determined
10:37:38 this is preferable to the kind of approach that plaintiffs
10:37:41 advocate where you simply list a bunch of job duties for a
10:37:45 specific occupation.
10:37:46 Number one, there are a lot of tipped
10:37:48 occupations. That would be very difficult to do. Those
10:37:50 lists do not evolve and adapt to new circumstances. One
10:37:55 example of this, your Honor, is that -- this is noted in
10:37:58 the preamble to the final rule. More recently, during the
10:38:01 pandemic, servers had been performing more of their work
10:38:04 rather than waiting tables, filling to-go orders, taking
10:38:08 orders over the phone and taking orders out to cars.
10:38:11 Now, they receive a tip for that in many
10:38:14 instances. And so, this new category of tests permits
10:38:18 that sort of type work to fall easily within this

framework. And a simple listing of job duties would not evolve sufficiently to capture that kind of work. And here, in this particular instance, it's to the benefit of employers because what the department has concluded is that is tipped work for which an employer can take a tip credit, and that might not be captured in a simple list of job duties that was put together prior to the pandemic and prior to that becoming a common practice.

I will note, too, that what the employers advocate, too, is that they criticize the Department of Labor for not conducting a survey of current restaurant practices or looking at the O*NET. And what the O*NET does is simply report what employees are telling the Department of Labor that their employers are currently requiring them to do. So this is not necessarily what is part of a tipped occupation. It's just what employees are currently being required to do by their employers.

And what plaintiffs' position essentially boils down to is that our rule is arbitrary because it doesn't take a look at current practices of the regulated industry and say that those practices are lawful in the final rule. And unfortunately, for regulated parties, that's just not the way government regulations work. We don't have to endorse whatever the status quo is.

The Department of Labor here has rashly

10:39:43 determined that certain work is not part of the tipped
10:39:47 occupation, and some of that work is work that restaurants
10:39:49 are currently requiring employees to perform. And it is
10:39:54 not arbitrary for the Department of Labor to say that some
10:39:58 current practices are unlawful. Regulations do not
10:40:03 necessarily have to be simply descriptive of the practices
10:40:06 of the regulated industry in order to be nonarbitrary.
10:40:11 I'll also note that the Department of Labor has
10:40:16 made significant changes to this rule between the notice
10:40:18 of proposed rulemaking and the publication of the final
10:40:21 rule in response to a lot of employer comments that they
10:40:24 found it was unworkable. They clarified the definition of
10:40:28 what a tip-producing work is.
10:40:32 So a lot of the employers and employer groups
10:40:39 commented that they found, you know, employees are going
10:40:43 immediately back and forth over the course of seconds
10:40:44 during table service between what they perceive to be
10:40:49 directly supporting work and tip-producing work. And what
10:40:52 the Department of Labor clarified in the final rule is
10:40:54 that tip-producing work is meant to be construed broadly
10:40:57 to encompass all the work that employee performs as part
10:41:03 of customer service for which that employee receives tips.
10:41:06 It also provided several other examples as part of the
10:41:09 final rule that make clear when certain employees are
10:41:13 engaged in tip-producing work and when they are not.

10:41:16 Plaintiffs point to specifically the situation of bussers and service bartenders and note that, you know, there are instances where a busser performs work that they would be regarded as a tipped employee during that work, but maybe a server would not. I mean, the key difference here is, these are not the same situation being treated differently. They are decidedly different situations because a server's work is customer service in different circumstances than a busser's work would be considered customer service.

10:41:45 A busser is undeniably regarded as a tipped employee, but the specific type of tipped work that they perform is work that is essentially done through the server. They get their tips through the server for work that they perform. And so, the department treats them differently because they are decidedly different context. They are tipped employees that operates very differently from a server. And key to this, though, is plaintiffs don't deny that though this is -- the work is different depending on the context. The final rule makes it very clear how it's going to apply to servers and how it's going to apply to bussers and service bartenders.

10:42:23 There's no sort of like confusion there because the final rule makes very clear that when a busser busses a table, they get a tip through the server for that work,

10:42:33 and they are considered a tipped employee during that
10:42:35 time, and the employer may take a tip credit for that
10:42:38 work.
10:42:45 I want to spend some time, also, on the harm.
10:42:50 And I think the declarations before the Court as well as
10:42:53 the testimony today are just extremely vague on the type
10:42:56 of harm that's being performed. There's no sort of
10:42:58 detailed description of specific restaurants, specific
10:43:02 efforts, specifically planned efforts that are going to be
10:43:05 undertaken. The only restaurant owner who has submitted a
10:43:08 declaration to the Court is Ms. Vaught. And that is the
10:43:12 declaration that plaintiffs were looking at and that they
10:43:14 had highlighted on the screen.
10:43:16 Critically what that declaration says is the
10:43:18 whole cost as plaintiff acknowledges, the whole cost
10:43:22 described in that declaration is the cost of the employer
10:43:24 completely foregoing the tip credit altogether. And what
10:43:27 that declaration says is that would be our cost if, quote,
10:43:30 if we were to forego the tip credit. But there's no
10:43:33 detailed description in that declaration that that
10:43:37 employer actually will forego the tip credit or why the
10:43:40 final rule compels them to forego the tip credit. And the
10:43:43 type of harm that would justify a preliminary injunction
10:43:48 has to be certain, it has to be great, it has to be
10:43:50 imminent. And nothing in that declaration establishes

10:43:53 that the harm described is any of those three things.
10:43:56 It's merely speculative.
10:43:57 I'd also just sort of like to note that, you
10:44:05 know, a lot of the harm that plaintiffs raised and that
10:44:09 Mr. Amador testified about are -- is sort of this vague
10:44:13 concerns that were being received after the publication of
10:44:16 the proposed rule. But it was a fundamental change in the
10:44:20 final rule where the department addressed employer
10:44:24 concerns about some of these issues by ensuring that it
10:44:28 was clear that the definition of tip-producing work is to
10:44:32 be construed broadly. It encompasses all of the work that
10:44:36 a server performs, that a bartender performs as part of
10:44:39 their customer service for which they receive tips, and
10:44:41 provides more examples for each profession and for new
10:44:46 professions in order to make that clear.
10:44:51 And given those changes and given the structure
10:44:54 of the rule, these sort of concern in this representation
10:44:58 that there would have to be some kind of new
10:45:01 minute-by-minute monitoring of every employee's activities
10:45:06 is really unfunded. This is a rule that can be complied
10:45:09 with with upfront changes to how schedules are put
10:45:13 together and the work to which employees are assigned.
10:45:16 And that's going to require some work to comply with
10:45:19 certainly, but the harm that the plaintiffs described is
10:45:21 really not supported by the nature of this final rule.

10:45:25 And, indeed, prior to this final rule, during the
10:45:27 many decades in which employers were being subjected to
10:45:31 the 80/20 rule, which was, again, a quantitative temporal
10:45:36 limitation on the amount of time that employees could be
10:45:38 subjected to to perform non-tip-producing work or related
10:45:42 duties before the employer had to start paying them
10:45:45 minimum wage, the Restaurant Law Center and plaintiffs'
10:45:50 litigation counsel put out guidance for how restaurants
10:45:52 could comply with these quantitative temporal limits; and
10:45:56 what they suggested is precisely what we're saying they
10:45:58 can do to comply with this rule. Structuring of tasks,
10:46:03 having employers clock in -- if you want to have an
10:46:06 employee perform a significant amount of non-tip-related
10:46:09 duties at the beginning of a shift, either limit those
10:46:11 duties to the temporal limitations placed by the rule or
10:46:13 have them clock in at the minimum wage prior to the shift
10:46:16 beginning, perform those duties and then, clock into the
10:46:20 tipped duty.
10:46:21 This is guidance that they put out in May of
10:46:24 2021, before this final rule was even proposed to the
10:46:29 industry. Your Honor has any questions?
10:46:33 THE COURT: No. Thank you very much.
10:46:37 MR. DECAMP: Your Honor, just to briefly address
10:46:38 a few of the points that were made here.
10:46:40 THE COURT: Sure.

10:46:42 MR. DECAMP: First, with regard to your Honor's
10:46:43 question about inferences to be drawn from legislative
10:46:48 inaction in the face of an agency regulatory or
10:46:52 sub-regulatory position, I think it's worth noting that
10:46:55 nobody knew about this sub-regulatory issue, the field
10:47:00 operations handbook, the 1988 sub-regulatory articulation
10:47:04 of DOL that they had issued this 20 percent standard for
10:47:07 the first time. People didn't know about it at the time.
10:47:11 It was not widely publicized. The field operations
10:47:14 handbook was, in fact, not a public document at that time.
10:47:17 This provision was not publicly available. It didn't get
10:47:20 into the public record until the '90s.
10:47:22 I ran the Wage and Hour Division at the
10:47:24 Department of Labor for a period of time. I had been at
10:47:25 the department about two years before I ever heard of this
10:47:29 rule. It is not something that was widely known. People
10:47:31 didn't really first hear about it until about 2007, when I
10:47:35 believe it was the Eastern District of Missouri, if I've
10:47:38 got the court correct -- it might have been a different
10:47:40 court. I believe that was the court. The district court
10:47:43 in Fast against Applebee's, when that decision came down,
10:47:48 that's when people first got attention to this issue. To
10:47:52 be clear, Congress didn't know about this issue. It
10:47:55 wasn't front and center top of mind for an extended period
10:47:58 of time and Congress thought this is fine.

10:48:00 It first hit the public's attention in -- I
10:48:03 believe it was 2007 when the district court decision came
10:48:06 out. After that and since then and pretty much
10:48:08 continuously since then, this has been a matter that's
10:48:11 been in litigation, actively fought in court after court.
10:48:14 So it's understandable that Congress wouldn't necessarily
10:48:18 want to step in while the matter is playing out in the
10:48:20 courts. Obviously Congress has a lot on its mind, and
10:48:24 over the past 10 years or so, 15 years, has had more on
10:48:27 its mind than in today's legislative environment, getting
10:48:29 60 votes on something, on anything, particularly involving
10:48:33 the Fair Labor Standards Acts, is a real challenge.
10:48:35 So I don't think there's a lot of inference that
10:48:38 can be drawn from the fact that Congress in the 15 years
10:48:40 or so, 14, 15 years since this dual jobs issue, this 20
10:48:45 percent issue first hit national prominence, I don't think
10:48:49 that there's a lot of conclusion that could be drawn from
10:48:51 that. It's not the same as 40 years of consistent agency
10:48:53 practice, well known, Congress knew about it, acquiesced
10:48:56 in it. That's very different scenario there.
10:48:58 With regard to the statement that these tipped
10:49:01 employees make 2.13 an hour, that is true with regard to
10:49:05 their cash wage, but they also have to make at least then
10:49:10 a corresponding average of 5.12 an hour in tips in order
10:49:14 to get to the minimum wage. There is no tipped employee

10:49:17 that at the end of this process ends up with less money in
10:49:22 their hand than an employee who was not a tipped employee
10:49:24 who received an hourly wage equal to the minimum wage.
10:49:27 They are equivalently situated from a tax standpoint, from
10:49:32 a wage standpoint, all of it.
10:49:33 So these are not 2.13-an-hour employees. These
10:49:37 are employees who are receiving earnings, wages under the
10:49:39 FLSA and earnings under the Internal Revenue Code that are
10:49:44 equal to or greater than the earnings that minimum wage
10:49:48 employees receive.
10:49:48 With regard to the agency's consistent practice,
10:49:51 it's not as simple as the agency maintaining a position
10:49:54 consistently since 1988. That is just not the case. In
10:49:58 2009, the department issued an opinion letter, withdrew it
10:50:03 upon a change of administration, but issued an opinion
10:50:06 letter in 2009 withdrawing the 20 percent guidance. So
10:50:10 the agency has moved back and forth. And then, again, in
10:50:12 2018 and 2019 and 2020, the department clearly took a
10:50:19 position that was contrary to this 20 percent rule.
10:50:21 So it's not as though it's maintained a
10:50:23 monolithic, specific, consistent policy throughout. There
10:50:27 were periods of time, stretches of time where yes, it had
10:50:29 a single view on the 20 percent rule, and then, there were
10:50:31 periods of time when it did not. Now, the six or so weeks
10:50:34 in 2009, some courts have dismissed that and said, well,

10:50:37 that was just a blip. But the two or three years when the
10:50:39 department during the previous administration actively
10:50:44 rescinded and worked to get rid of the sub-regulatory
10:50:48 guidance and then, embody that position in a final rule,
10:50:52 that was an extended period of time where the department
10:50:55 said this is not the law. So it's not as simple as a
10:50:59 straightforward, single unitary agency position.
10:51:04 With regard to O*NET, even if one takes the
10:51:06 position that the Department of Labor is not required to
10:51:11 accept as given whatever the current practices of the
10:51:14 industry are because industries can go out of compliance,
10:51:17 industries can do things and, therefore, O*NET somehow
10:51:20 gives employers the ability to kind of pole positions in
10:51:24 directions they shouldn't.
10:51:25 That might be fine, but the department also never
10:51:29 considered any historical data either. Never considered
10:51:31 any of the data regarding how did these jobs function in
10:51:35 1966, when Congress first enacted the tip credit? What
10:51:39 was Congress' understanding of what it means to be a
10:51:42 server, a waiter, a busser, a service bartender? What did
10:51:48 Congress mean by those terms when it said in the
10:51:51 legislative history in '66 and '74 that these are roles
10:51:54 that should be tipped, that we regard as tipped
10:51:57 employment.
10:51:57 So even if one gives the department some leeway

10:52:02 to not defer completely to current industry practice, the
10:52:07 fact is, they never considered any historical practice.
10:52:10 They just made it up and said, you know, in our review,
10:52:14 making salads is the work of chefs, and then, doubled down
10:52:17 on it and cited that in every decision since leading to
10:52:21 the sub-regulatory guidance articulating 80/20, and then,
10:52:25 leading eventually through a meandering path to the
10:52:29 current final rule, but without any actual view of what
10:52:32 the facts are.
10:52:33 Instead, what we end up with is this extra
10:52:36 statutory concept of a tipped occupation, which is not the
10:52:38 language in the statute. In the statute, it's not about
10:52:41 tipped occupations. It's about tipped employees engaged
10:52:44 in an occupation. An occupation that may have a
10:52:47 relatively low amount of tips, $30 a month. That's not a
10:52:50 lot of tips.
10:52:51 There's nothing in the structure of the FLSA --
10:52:52 and I don't mean to repeat what I said before. I'll wrap
10:52:55 up quickly here. There's nothing in the text of the FLSA
10:52:57 or the structure of the FLSA suggesting there's anything
10:52:59 inequitable about having a tipped employee spending a
10:53:03 considerable amount of time on tasks that don't
10:53:06 necessarily generate tips as long as they're earning
10:53:09 enough in tips to meet that standard of $30 a month, and
10:53:13 if there's any gap in the amount of tips that is being

10:53:16 topped up so that employee is not harmed, not in any worse
10:53:20 position than a non-tipped employee earning full minimum
10:53:24 wage.
10:53:24 That's all this is about. It's not meant to be
10:53:26 some kind of deep existential analysis of when is a server
10:53:30 not a server, when is a server who's sitting there waiting
10:53:33 for a customer but not getting a customer really a tipped
10:53:35 employee or not. The department says they're in a
10:53:37 different occupation. They don't say what occupation, but
10:53:39 it's not a tipped occupation. But that's not what
10:53:42 Congress said. That's not what the statute said. And
10:53:45 there are obviously many other examples we talked about
10:53:48 today.
10:53:48 Congress has just gone on a frolic -- the
10:53:52 department has gone on a frolic and detour here with this
10:53:54 rulemaking. It's not tethered to the statute and it is
10:53:58 not entitled to any deference, and it fails the Chevron
10:54:01 analysis.
10:54:01 THE COURT: Thank you. This has been very
10:54:02 helpful. I appreciate so much your insights today. And
10:54:08 I'm going to review your filings and in light of the
10:54:14 arguments you've made today, and I'll take this under
10:54:16 advisement and we'll get something out forthwith.
10:54:19 MR. DECAMP: Thank you, your Honor.
10:54:20 THE COURT: Anything else I can do for you today?

10:54:22 MR. DECAMP: No thank you, your Honor.

10:54:24 THE COURT: All right. Are we good?

10:54:26 MR. WALKER: I'm good, your Honor. Thank you.

10:54:27 THE COURT: All right. Thank you very much. And

10:54:29 those of you who are traveling, safe travels.

(Proceedings concluded.)

* * * * * *

UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter, Registered Merit Reporter, in my capacity as Official Court Reporter of the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 26th day of February, 2022.

Lily Iva Reznik

~~~~~~~~~~~~~~~~~~~~~~~~

LILY I. REZNIK, CRR, RMR
Official Court Reporter
United States District Court
Austin Division
501 West 5th Street,
Suite 4153
Austin, Texas 78701
(512)391-8792
SOT Certification No. 4481
Expires: 1-31-23
~~~~~~~~~~~~~~~~~~~~~~~~